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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

DANIEL M. TABAS, JOSEPH P. CAMPBELL, JAMES J. MCSWIGGAN, LEE A. TABAS, ROBERT TABAS, SUSAN TABAS TEPPER, LINDA TABAS STEMPEL, JOANNE TABAS WURZAK, CAROL TABAS STOFMAN, and HOWARD WURZAK,

Petitioners,

—v.—

HARRIETTE S. TABAS, RICHARD S. TABAS, NANCY C. TABAS, and GERALD LEVINSON, as Executors of the Estate of Charles L. Tabas,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989), this Court held that RICO's "pattern of racketeering activity" element requires proof not only that the racketeering activities are "related," but also that "the predicates themselves amount to, or that they otherwise constitute a threat of, continuing racketeering activity," *id.* at 240, noting that "[t]he development of these concepts must await further cases," *id.* at 243.

1. Is the continuity requirement of RICO's "pattern of racketeering activity" element established merely by showing the temporal duration of alleged predicate acts, or is it also a function of other factors such as the number of victims, the number of perpetrators, the presence of multiple schemes, the number and variety of predicates, and the character of the unlawful activity?

2. When alleged RICO predicate acts are innocent mailings, are not the underlying fraud's duration, scope, character, and relation to the mailings necessarily considered in determining whether the mailings fall within the scope of RICO and the mail fraud statute?

3. May a garden-variety state-law dispute solely over the proper distribution of a liquidating family partnership be transformed into a federal RICO case simply by alleging that the defendants used the United States mail to dispatch payments to the plaintiffs over a three-year period, particularly where there would be no predicate acts if those payments had been delivered by hand, commercial service, or not at all?

4. Does the undefined RICO "pattern of racketeering activity" element violate the Fifth Amendment's proscription that laws capable of criminal application not be unduly vague?

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IN THE SUPREME COURT OF THE UNITED STATES
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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners respectfully petition this Court to issue a writ of certiorari to review the February 13, 1995 judgment of the United States Court of Appeals for the Third Circuit sitting in banc, reversing the district court's grant of summary judgment against respondents' RICO claims and remanding for trial.

OPINIONS BELOW

The in banc opinion of the United States Court of Appeals for the Third Circuit is not yet published and is reprinted in the appendix below ("Pet. App.") at 2a.[1] The order vacating the panel decision was not officially published and is reprinted below at 70a. The panel decision was not officially published and is reprinted below at 71a. The district court's order granting summary judgment in favor of petitioners was not officially published and is reprinted below at 130a.

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[1] "_a" refers to the Appendix to this Petition below.

JURISDICTION

The Court of Appeals issued its opinion in banc on February 13, 1995. For the court, Judge Roth ordered that the issuance of the certified judgment in lieu of mandate be stayed until April 5, 1995, and thereafter if a petition for certiorari is filed by that date. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

This petition draws in question the constitutionality of an Act of Congress, and the United States or any department, office, agency, officer, or employee thereof is not a party to this action. Therefore, 28 U.S.C. § 2403(a) may be applicable, and this petition has been served on the Solicitor General.

STATUTES INVOLVED

The Fifth Amendment provides, in pertinent part, "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law."

The relevant provisions of the Racketeer Influenced and Corrupt Organizations chapter of the Organized Crime Control Act of 1970, Pub. L. 91-452, Title IX, 84 Stat. 941, as amended, 18 U.S.C. §§ 1961-68 (1982 & Supp. V) ("RICO"), are reproduced below at 139a.

The relevant provision of the Mail Fraud Chapter of Title 18, United States Code, as amended, 18 U.S.C. §§ 1341-46 (1988 & Supp. I) ("mail fraud statute"), is reproduced below at 143a.

STATEMENT OF THE CASE

1. Daniel Tabas and his late brother, Charles Tabas, were business partners whose affairs were governed by a written partnership agreement providing for the equal distribution of income and for the succession of a partner's estate to his interests. Following Charles' death in 1983, Daniel and Charles' widow for his Estate agreed to continue certain practices, that had been agreed to and participated in by Charles, regarding the use and distribution of partnership funds. In 1986, the Estate filed suit in state court, alleging that these practices, although agreed to and participated in

by Charles himself, his widow, and the Estate, constituted "fraud" and "waste" by Daniel. That state court litigation was settled in 1987 pursuant to a written settlement agreement.

In the settlement agreement, Daniel and the Estate agreed to terminate the partnership and to liquidate the partnership assets (real estate and other business holdings) through public auction or mutual agreement. The settlement agreement provided that disputes would be resolved by binding, final arbitration and named a state court judge as the initial arbitrator.

2. Implementing the liquidation proved contentious, and the arbitrator issued more than ten awards regarding the liquidation procedures. In 1991, the Estate filed a new suit in federal court, alleging that Daniel and his close relatives and employees defrauded the Estate by improperly using partnership funds to pay for personal and other expenses in violation of RICO and state law. The Estate transmuted its garden-variety state-law fraud claim into purported RICO claims through the alchemy of asserting that the thirty-nine monthly mailings, each containing solely a $15,000 check as an advance on the eventual distribution of a liquidating partnership, and the two mailings of tax returns constituted forty-one separate acts of "mail fraud," based on a mere disagreement over what were "legitimate" partnership deductions.

The district court granted summary judgment on the RICO claims. Citing this Court's decision in *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 239 (1989), that a RICO "pattern" requires at least two predicate acts that "are related, and . . . amount to or pose a threat of continued criminal activity," and applying the multi-factor pattern "continuity" test set out in *Barticheck v. Fidelity Union Bank*, 832 F.2d 36, 39 (3d Cir. 1987) (cited approvingly by this Court in *H.J.*, 492 U.S. at 235 n.2, 241 & n.3), the district court dismissed the complaint for failure to allege the required continuity and hence to allege the required RICO pattern. Pet. App. 135a-37a.

Noting that, at most, respondents' claims involved a single victim, a single actor, and a single injury, the district court found that the allegations did not demonstrate any continuity of racketeering activity, notwithstanding the three-year duration of the

alleged predicate acts (mailed payments of advances and two tax returns to Charles' Estate):

> No one else is affected. There is no threat to the community at large. This is not a case where the predicate acts are "part of an entity's regular way of doing business," such as would affect others doing business with the entity.

Pet. App. 136a-37a. The case was, in the district court's view, "a most regrettable war between sides of a very successful family that has added much to the economy of the Philadelphia area," but not one litigable in federal court for treble damages under RICO. Pet. App. 137a-38a.

3. On appeal, a panel of the Court of Appeals reversed, 2-1. Notwithstanding its "concern over the broad use of the civil RICO statute" (Pet. App. 112a), the panel found that respondents had provided evidence of a "pattern of racketeering activity," because the advance checks representing partial distribution of profits were mailed to Charles' Estate over a period of three and one-half years, which was held to be a clearly substantial period of time (Pet. App. 101a), and because this conduct was on-going (Pet. App. 102a).

4. The Court of Appeals split 7-6 on rehearing in banc and narrowly adhered to the result reached by the panel. The court acknowledged that its ruling "means that RICO, with its severe penalties, may be applicable to many 'garden-variety' fraud cases, particularly considering the judiciary's broad interpretation of the mail fraud statute," but felt constrained to reach that result by *H.J.* and left correction to Congress. Pet. App. 38a (citation omitted). Its analysis went substantially further than the panel's, however, concluding that in a case such as this, where checks that allegedly understated the Estate's share of income were mailed over a period of years, "the relatedness and the frequency of the predicate acts would have created the pattern of racketeering activity." Pet. App. 34a.

Notwithstanding its protestations, the court's decision renders continuity exclusively a durational concept: Judge Roth's opinion expressly declined to consider the *Barticheck* multi-factor test that

the Court of Appeals had previously relied on to discern pattern continuity and stated that the factors are not necessarily relevant to, or necessarily to be considered in, RICO cases, although it noted that they might be relevant in some cases. Pet. App. 36a-38a.

Judges Becker, Stapleton, and McKee, concurring, would have expressly overruled *Barticheck* altogether. Pet. App. 40a-42a (Becker, J., concurring). Judge Alito also concurred in the result, although he declined to join the majority's analysis concerning pattern continuity and continued to adhere to his analysis that continuity is exclusively a durational concept as he explained in *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1419-26 (3d Cir.) (Alito, J., concurring and dissenting), *cert. denied*, 501 U.S. 1222 (1991). Pet. App. 49a-50a (Alito, J., concurring).

Judge Greenberg, for six judges, sharply dissented on the ground that RICO's pattern requirement does not allow a "state-law dispute . . . over the proper allocation of a partnership's profits [to be transformed] into a federal RICO case simply by alleging that the defendants used the United States mail to communicate with it over a substantial period of time." Pet. App. 50a (Greenberg, J., dissenting). The dissent focussed on the *Barticheck* factors, particularly the requirement - abjured by the majority - that to determine whether a RICO pattern of racketeering activity is pleaded courts must consider the character of the unlawful activity:

> no matter how the Estate characterizes this case, and even if there were some fraudulent acts, this suit is first and last a dispute about how the partnership income should have been distributed. Seen in this context, the mailing of the checks was so benign an act that it is a thin foundation on which to build the continuity element. At bottom, regardless of the pejorative words which the Estate uses to characterize the defendants' conduct, this case involves a commercial dispute over a discrete issue, the amount due to the Estate in its monthly draws.

> Such a dispute is simply not a RICO controversy.

Pet. App. 63a-64a (Greenberg, J., dissenting). Judge Nygaard joined the dissent but would have focussed, not on the continuity element, but on the ground that the mailings were "merely post-fraud means of transmitting matter from one place to another," and hence not "for the purpose of executing the scheme, as required by the statute." Pet. App. 69a n.38 (Greenberg, J., dissenting).

REASONS FOR GRANTING THE WRIT

The petition should be granted to resolve continued conflict among the Courts of Appeals regarding the meaning of RICO's "pattern of racketeering activity" element and to develop further "[t]he limits of the relationship and continuity concepts that combine to define a RICO pattern, and the precise methods by which relatedness and continuity or its threat may be proved." *H.J.*, 492 U.S. at 243.

When the Court last addressed this issue in *H.J.* in 1989, it provided only limited guidance on the meaning of "pattern continuity" and the "continuity plus relationship" concept, holding only that there was no requirement of "multiple schemes." Instead, the Court noted that "development of these concepts must await future cases." *Id.*

This case provides an exceptional and timely vehicle for the Court to explain, for the first time, the outer limits of RICO's "pattern of racketeering activity" element and to develop a cogent standard that can be given to a jury, applied by the federal and state courts, and understood by the public. This is so for a number of reasons, namely the conflict among the Courts of Appeals that has continued since *H.J.* and has intensified with the in banc majority's holding below, the clarity of the issues posed by a RICO complaint that was conceded by virtually every judge writing to be a garden-variety state-law fraud case, the four sharply conflicting opinions rendered on both sides of the Court of Appeals' 7-6 division, the 7-7 split by the fourteen judges who have considered this case, and the brevity of a record based upon a motion for summary judgment rather than a trial. This case offers the opportunity to ensure, as

RICO's congressional sponsors repeatedly insisted, that RICO's "reach beyond organized crime" is at most "incidental," 116 Cong. Rec. 18914 (1970) (remarks of Senator McClellan), and that, although RICO extends beyond organized crime to some extent, it is "confined to such cases to the maximum degree possible," *id.*; *see also id.* at 35344 (remarks of Rep. Poff). Alternatively, this case provides an opportunity for the Court to determine whether the undefined RICO term "pattern" is unconstitutionally vague. *See H.J.*, 492 U.S. at 251 (Scalia, J., concurring in the judgment).

I.

THE THIRD CIRCUIT'S HOLDING THAT RICO PATTERN CONTINUITY IS A PURELY TEMPORAL CONCEPT CONFLICTS WITH THIS COURT'S DECISION IN *H.J.* AND WITH DECISIONS OF THE FIRST, FOURTH, FIFTH, SIXTH, SEVENTH, NINTH, TENTH, AND DISTRICT OF COLUMBIA CIRCUITS.

RICO provides that a "pattern of racketeering activity" "requires at least two acts of racketeering activity, one of which occurred after [October 15, 1970,] and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity." 18 U.S.C. § 1961(5) (1982 & Supp. V). Although this statutory section provides a baseline requirement of two predicates within ten years, it does not define "pattern."

The Court stated in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n.14 (1985), that the implication from § 1961(5) is that, "while two acts are necessary, they may not be sufficient" to establish a pattern. The Court then quoted legislative history explaining that

> The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one "racketeering activity" and the threat of continuing activity to be effective. It is this factor of *continuity plus*

> *relationship* which combines to produce a pattern.

Id. (quoting S. Rep. No. 91-617 at 158 (1969) (alteration in original)).

Subsequent to *Sedima*, the Courts of Appeals seized on this passage and its reference to "continuity plus relationship." The result, however, was a plethora of different views of how "continuity plus relationship" is demonstrated in order to establish a pattern. Noting that Congress had taken no action to illuminate further the pattern element and that "developing a meaningful concept of 'pattern' within the existing statutory framework has proved to be no easy task," the Court sought to undertake this task and to resolve the conflict among the Courts of Appeals in *H.J.* 492 U.S. at 236.

Although the Court in *H.J.* explained that "Congress was concerned in RICO with long-term criminal conduct," *id.* at 242, it limited its holding to a rejection of the Eighth Circuit's "multiple schemes" test:

> although proof that a RICO defendant has been involved in multiple criminal schemes would certainly be highly relevant to the inquiry into the continuity of the defendant's racketeering activity, it is implausible to suppose that Congress thought continuity might be shown only by proof of multiple schemes.

Id. at 240; *see id.* at 254 (Scalia, J., concurring in the judgment).

Rather, the Court stated, that

> What a plaintiff or prosecutor must prove is continuity of racketeering activity, or its threat, *simpliciter*. This may be done in a variety of ways, thus making it difficult to formulate in the abstract any general test for continuity. We

> can, however, begin to delineate the requirement.

Id. at 241. The extent of the Court's delineation, though, was to note that continuity is "centrally a temporal concept" that is "both a closed- and open-ended concept." *Id.* at 241-42. The Court noted that "[t]he development of these concepts must await future cases, absent a decision by Congress to revisit RICO to provide clearer guidance as to the Act's intended scope." *Id.* at 243.

Justice Scalia, concurring in the judgment and joined by the Chief Justice and Justices O'Connor and Kennedy, commented that the Court "does little more than repromulgate those hints [given in *Sedima*] as to what RICO means, though with the caveat that Congress intended that they be applied using a 'flexible approach'" and that "[t]here is no reason to believe that the Courts of Appeals will be any more unified in the future, than they have in the past, regarding the content of this law." *H.J.*, 492 U.S. at 255-56 (Scalia, J., concurring in the judgment).

Justice Scalia's forecast has proved accurate indeed. The Courts of Appeals and the district courts have struggled to prevent RICO from becoming a surrogate for garden-variety fraud actions properly brought under state law. *E.g.*, *Midwest Grinding Co. v. Spitz*, 976 F.2d 1016, 1025 (7th Cir. 1992). Nonetheless, "[d]isparities between courts and between circuits continue to exist. Even within a circuit and between circuit court panels, there are different views on the impact of *H.J.* and the extent to which it suggests changes in pre-*H.J.* analysis." 1 Arthur F. Mathews, *Civil RICO Litigation* § 4.03[E][2] at 4-74 (2d ed. 1992). The conflict between the Courts of Appeals on the standard for determining pattern continuity has never been as stark as it is now in light of the Third Circuit's in banc opinion in this case.

Previously, the Third Circuit interpreted *H.J.* to permit the continued application of the multi-factor test set forth in *Barticheck*. *Marshall-Silver Constr. Co. v. Mendel*, 894 F.2d 593, 596 (3d Cir. 1990). *Barticheck* held that the existence of a RICO pattern is determined by a "combination of specific factors such as the number of unlawful acts, the length of time over which the acts were committed, the similarity of the acts, the number of victims,

the number of perpetrators, and the character of the unlawful activity." 832 F.2d at 39.

However, in the instant case, the in banc majority focused on the duration of the scheme underlying the alleged mail fraud predicate acts, found that it lasted three and one-half years, and held, "from the strictly durational aspect of the scheme, that plaintiffs in the present case have made a sufficient showing to survive summary judgment on the 'continuity' prong of the pattern analysis." Pet. App. 33a.

Although the majority gave as an additional reason for finding closed-ended continuity that the alleged predicate acts (the monthly mailing of advances on distribution) were petitioners' regular way of conducting their legitimate business (Pet. App. 34a), and for the same reason found open-ended continuity (Pet. App. 35a-36a), the foundation of the majority's holding and the standard that it applied rest solely upon duration (Pet. App. 35a ("even if we were not to have found that conduct lasting three and one-half years was sufficient to establish closed-ended continuity")); *id.* 34a n.19 ("we in no way imply that the predicate acts must constitute a 'regular way' of a defendant's doing business")).

Additionally, despite having effectively held that duration alone is sufficient to demonstrate continuity, the court created confusion even among its own members by indicating that in some unidentified circumstances further analysis using the multi-factor standard established in *Barticheck* may still be relevant. Pet. App. 36a-37a & n.21; *id.* 41a (Becker, J., concurring) ("This reluctance to overrule *Barticheck* thus has the unfortunate potential for contributing to doctrinal confusion, for . . . a given factor either is or is not relevant to the existence of a 'pattern' of racketeering activity"); *id.* 56a (Greenberg, J., dissenting) ("Thus, if the *Bartichek* [sic] factors are relevant at all, they are relevant in shedding light on all cases").

The majority's standard that duration alone is sufficient to determine continuity without considering other factors is clearly in tension with the Court's holding in *H.J.* that, although not a necessary element of pattern continuity, "multiple criminal schemes would certainly be highly relevant to the inquiry into the continuity

of the defendant's racketeering activity." 492 U.S. at 240. Indeed, the majority did not even consider the absence of this factor.

In addition, the Court observed in *H.J.* that the continuity and relationship "constituents of RICO's pattern requirement must be stated separately, though in practice their proof will often overlap." 492 U.S. at 239. Nonetheless, the in banc majority did not consider whether the factors that determine relationship may also be relevant to determining whether the alleged activity poses a threat of continued, long-term criminal conduct.

Further, the in banc majority reasoned that the alleged activity (mailing advances on distribution of a liquidating partnership) constituted Daniel's regular way of conducting his on-going legitimate business, even though this activity was not directed towards, and in no way impacted on, any other entity, and certainly not one with whom the partnership did business. Pet. App. 34a-36a. *Contra id.* 60a (Greenberg, J., dissenting); Pet. App. 136a-37a. Under this standard, any repeated activity, even if only repeated in relation to one entity, constitutes the defendant's "regular way of doing business," thereby clashing with the Court's discussion of "regular way of doing business" in *H.J.*, 492 U.S. at 242-43.

The majority's decision squarely conflicts with two groups of continuity standards established by the other Courts of Appeals. *See* Pet. App. 144a (Table of the Courts of Appeals' Conflicting Pattern Continuity Standards). For instance, writing for the First Circuit in *Apparel Art Int'l v. Jacobson*, 967 F.2d 720, 722-23 (1st Cir. 1992), then-Chief Judge Breyer found it more effective to discuss "what lies beyond [the] conceptual scope" of pattern continuity, than to "provide an alternative verbal formulation of what lies within," and held that "a single episode does not constitute a 'pattern,' even if that single episode involves behavior that amounts to several crimes (for example, several unlawful mailings)."

This type of continuity standard that focuses on the conceptual scope of RICO using the character of the predicate acts (the rationale for which was explained in *Apparel Art*) is also employed

by the Fourth, Fifth, Sixth, and Ninth Circuits.[2] For example, in *Menasco, Inc. v. Wasserman*, 886 F.2d 681, 683 (4th Cir. 1989), which was decided after *H.J.*, the Fourth Circuit observed that

> The "pattern" requirement is more than incidental to the operation of the RICO statute. In providing a remedy of treble damages for injury "by reason of a violation of" RICO's substantive provisions, Congress contemplated that only a party engaging in widespread fraud would be subject to such serious consequences. The pattern requirement in § 1961(5) thus acts to ensure that RICO's extraordinary remedy does not threaten the ordinary run of commercial transactions; that treble damages suits are not brought against isolated offenders for their harassment and settlement value; and that the multiple state and federal laws bearing on transactions such as this one are not eclipsed or preempted.

(citations omitted). In applying their standards, some of these Courts of Appeals also consider whether the alleged predicate acts constitute a "regular way of doing business" that imposes a significant societal threat of continued criminal conduct. *E.g.*, *id.* at 684 ("Clearly, these acts do not constitute 'ongoing unlawful activities whose scope and persistence pose a special threat to social

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[2] In *Vemco, Inc. v. Camardella*, 23 F.3d 129, 135 (6th Cir.), *cert. denied*, 115 S. Ct. 579 (1994), the Sixth Circuit found no pattern continuity where there was only a single victim, a single scheme, and a single purpose over a period of seventeen months. *Accord In re Burzynski*, 989 F.2d 733, 743 (5th Cir. 1993) (multiple acts of fraud over five years do not constitute pattern continuity because all "were part and parcel of a single, discrete and otherwise lawful commercial transaction"); *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1535 (9th Cir. 1992) (predicate acts designed to bring about a single event do not demonstrate pattern continuity).

well-being.'") (quoting *International Data Bank, Ltd. v. Zepkin*, 812 F.2d 149, 155 (4th Cir. 1987)).[3]

Adopting a different approach to determining pattern continuity, the Seventh, Tenth, and District of Columbia Circuits apply multiple-factor tests. For example, the Seventh Circuit employs a four-factor test that considers "(1) the number and variety of predicate acts and the length of time over which they were committed; (2) the number of victims; (3) the presence of separate schemes; and (4) the occurrence of distinct injuries." *McDonald v. Schencker*, 18 F.3d 491, 497 (7th Cir. 1994). The Seventh Circuit's standard is comparable to that which the Third Circuit previously applied but has now virtually abandoned and which the six in banc dissenting judges urged be retained. Pet. App. 55a (Greenberg, J., dissenting).[4]

If this case had been analyzed under the conceptual rubric explained by Justice Breyer, no pattern continuity would have been found and the district court's grant of summary judgment would

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[3] *Cf. Kehr Packages*, 926 F.2d at 1418 ("the duration of a scheme should not be afforded overriding significance 'in the absence of a more significant societal threat'") (quoting *Marshall-Silver*, 894 F.2d at 597).

[4] This multi-factor standard is also similar to the standards applied by the Tenth and District of Columbia Circuits. *Edmondson & Gallagher v. Alban Towers Tenants Ass'n*, ___ F.3d ___, No. 93-7146, 1995 U.S. App. Lexis 4670 at *10-11 (D.C. Cir. March 10, 1995) (considering number of schemes, number and extent of injuries, number of victims, number and scope of goals, number of predicates, duration, the court held that the single scheme, single discrete injury, and the existence of only three victims overwhelmed the countering significance of fifteen predicates and three-years duration); *Resolution Trust Corp. v. Stone*, 998 F.2d 1534, 1543 (10th Cir. 1993) (duration and extensiveness of the scheme are particularly relevant, and extensiveness includes consideration of number of victims, number of predicates, variety of predicates, distinctiveness of injuries, complexity and size of scheme, and nature or character of the enterprise or activity).

have been affirmed because all that respondents have alleged is a series of mailings that are incident to a single episode of alleged fraud with the narrow goal of allegedly depriving one partner of its share of profits from a partnership scheduled for liquidation.

If this case had been analyzed under the conceptual standards related to that of Justice Breyer and applied by the Fourth, Fifth, Sixth, and Ninth Circuits, no pattern continuity would have been found because the alleged conduct implicates only a "single fraudulent goal" (defrauding the Estate), only one victim (the Estate), and a "non-recurring scheme" that will terminate when the agreed-upon liquidation of remaining partnership property is completed; conduct that poses no "special threat to social well-being."

Similarly, had this case been analyzed under the multi-factor standards of the Seventh, Tenth, or District of Columbia Circuits, or under the previous Third Circuit standard, no pattern continuity would have been found because, although the duration is allegedly over three years, this one factor is strongly outweighed by the existence of only one scheme, one goal, one victim, one injury, and one type of predicate, namely innocent mailings merely incidental to the alleged underlying garden-variety state-law fraud.[5]

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[5] Indeed, this case is a prime example of how, under the Courts of Appeals conflicting pattern continuity standards, allegations of garden-variety state-law fraud can constitute a RICO violation in one federal jurisdiction, but not constitute criminal conduct or be subject to enhanced civil penalties in an adjoining state. Although this situation arises whenever there is a conflict among the circuits, its impact is greatly augmented when the conflict concerns the every-day private activities of individuals, as it does here.

II.

THE THIRD CIRCUIT'S HOLDING THAT, WHEN DETERMINING THE SUFFICIENCY OF INNOCENT MAILINGS ALLEGED TO BE MAIL FRAUD PREDICATES, ONLY THE DURATION IS PROPERLY CONSIDERED CONFLICTS WITH DECISIONS OF THE FIRST AND SEVENTH CIRCUITS.

In making its determination of pattern continuity, the in banc majority noted that

> in civil RICO complaints based on predicate acts of mail fraud "the continuity test requires us to look beyond the mailings and examine the underlying scheme or artifice. Although the mailing is the actual criminal act, the instances of deceit constituting the underlying fraudulent scheme are more relevant to the continuity analysis."

Pet. App. 31a (quoting *Kehr Packages*, 926 F.2d at 1414). The majority, however, considered only the duration of the alleged underlying scheme and ignored its scope, character, and relation to the actual mailings. Pet. App. 32a-33a.

The majority's analysis of mail fraud predicates in determining pattern continuity conflicts with that of the First and Seventh Circuits. The Seventh Circuit has repeatedly stated that

> "Mail fraud and wire fraud are perhaps unique among the various sorts of 'racketeering activity' possible under RICO in that the existence of a multiplicity of predicate acts (here, the mailings) may be no indication of the requisite continuity of the underlying fraudulent activity."

E.g., *Hartz v. Friedman*, 919 F.2d 469, 473 (7th Cir. 1990) (quoting *Lipin Enters., Inc. v. Lee*, 803 F.2d 322, 325 (7th Cir. 1986) (Cudahy, J., concurring)). Consequently, in applying each prong of its four-factor continuity analysis set out above, the

Seventh Circuit considers the scope, character, and relation to the actual mailings of the underlying fraudulent scheme or schemes. *See United States Textiles, Inc. v. Anheuser-Busch Cos.*, 911 F.2d 1261, 1268-69 (7th Cir. 1990).[6]

It is inconsistent for the in banc majority to pierce the surface of the mail fraud predicates and then to pick and choose what underlying aspects are relevant. Either the scheme or schemes underlying alleged predicate acts of mail fraud are relevant in their entirety to the pattern continuity analysis as recognized by the First and Seventh Circuits, or the scheme or schemes are not relevant at all as advocated by Judge Alito (Pet. App. 50a (Alito, J., concurring); *Kehr Packages*, 926 F.2d at 1422-23 (Alito, J., concurring and dissenting)). In this case, an analysis that looks beyond the mailings themselves and considers the entirety of the alleged underlying scheme would demonstrate that no long-term threat of continued criminal conduct exists, given that the alleged predicates concern only one victim and one scheme and will cease when the liquidation of the partnership assets is completed.

In addition, the Court stated in *Schmuck v. United States* that "[t]he federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud." 489 U.S. 705, 710 (1989) (quoting *Kann v. United States*, 323 U.S. 88, 95 (1944)). Thus, mailings that are not essential to the success of the scheme do not fall within the scope of the mail fraud statute. *United States v. Maze*, 414 U.S. 395, 399-403 (1974).

In light of the current prevalence of mail and wire transfer in both the commercial and private sectors, courts have struggled to effect Congressional intent to exclude from RICO's scope garden-variety state-law frauds where the only alleged predicate acts are

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[6] *See Apparel Art*, 967 F.2d at 723 (advocating the consideration of whether several instances of mail fraud comprise behavior that amounts only to a single criminal episode).

completely innocent mailings.[7] Because of this struggle and because of the conflict among the Courts of Appeals created by the in banc majority regarding the proper consideration of what underlies mail fraud mailings, this is an important issue ripe for determination by the Court.

III.

WHETHER THE UNDEFINED RICO "PATTERN OF RACKETEERING ACTIVITY" ELEMENT VIOLATES THE FIFTH AMENDMENT'S PROSCRIPTION THAT LAWS CAPABLE OF CRIMINAL APPLICATION NOT BE UNDULY VAGUE IS AN IMPORTANT ISSUE OF FEDERAL LAW THAT SHOULD BE SETTLED BY THE COURT.

Justice Scalia, concurring in the judgment in *H.J.*, wrote:

> Today's opinion has added nothing to improve our prior guidance [on the meaning of "pattern"], which has created a kaleidoscope of Circuit positions, except to clarify that RICO may in addition be violated when there is a "threat of continuity." It seems to me this increases rather than removes the vagueness. There is no reason to believe that the Courts of Appeals will be any more unified in the future,

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[7] *See, e.g.*, *United States v. Porcelli*, 865 F.2d 1352, 1359 (2d Cir.) (mailing blank tax form not "sufficiently closely related" to tax fraud scheme), *cert. denied*, 493 U.S. 810 (1989); *Kehr Packages*, 926 F.2d at 1416 n.3 (mailed letters were not "lulling" because a "person of ordinary prudence and comprehension could not be misled" by the alleged misrepresentations); *United States v. Vontsteen*, 872 F.2d 626, 629 (5th Cir. 1989) (mailed invoices could not satisfy "in furtherance" requirement); *Pyramid Secs., Ltd. v. IB Resolution, Inc.*, 924 F.2d 1114, 1118 (D.C. Cir.) (mailings that occurred after discovery of alleged fraudulent churning could not be "lulling"), *cert. denied*, 502 U.S. 822 (1991).

> than they have in the past, regarding the content of this law.

492 U.S. at 255 (Scalia, J., concurring in the judgment). Such vagueness, Justice Scalia concluded,

> is bad enough with respect to any statute, but it is intolerable with respect to RICO. For it is not only true, as JUSTICE MARSHALL commented in *Sedima* . . . , that our interpretation of RICO has "quite simply revolutionize[d] private litigation" and "validate[d] the federalization of broad areas of state common law of frauds," [473 U.S. at 501] (dissenting opinion), so that clarity and predictability in RICO's civil applications are particularly important; but it is also true that RICO, since it has criminal applications as well, must, even in its civil applications, possess the degree of certainty required for criminal laws, *FCC v. American Broadcasting Co.*, 347 U.S. 284, 296 (1954). No constitutional challenge to this law has been raised in the present case, and so that issue is not before us. That the highest Court in the land has been unable to derive from this statute anything more than today's meager guidance bodes ill for the day when that challenge is presented.

H.J., 492 U.S. at 255-56 (Scalia, J., concurring in the judgment) (internal quote alterations in original).

Because, as discussed above, Justice Scalia's prediction has been accurate and the Circuits remain sharply divided despite the Court's attempt at guidance in *H.J.*, and because, of the five current Justices who heard *H.J.*, four signed Justice Scalia's opinion

strongly questioning RICO's constitutionality, we tender this issue to the Court.[8]

We recognize that each of the seven Courts of Appeals that considered this issue post-*H.J.* concluded that, under the circumstances before them, RICO is not void-for-vagueness, notwithstanding the *H.J.* concurrence.[9] It would appear, however, that the cornerstone of each such decision was the premise that the "pattern" conundrum had been solved, namely by the definition reached in that Circuit's case law, and that the defendant's activities clearly formed a "pattern."

From a broader perspective, however, the national disarray of RICO pattern continuity jurisprudence (*see* Table at Pet. App. 144a) would seem to undermine each of those determinations and confirm that Congress has simply failed to provide the modicum of definiteness that the Fifth Amendment requires of a statute with criminal applications like RICO. This is particularly evident in this

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[8] Although the constitutionality of RICO was not previously raised in this case, the Court is not precluded from considering this issue. *E.g.*, *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980) (considering an important, recurring issue that was first raised in the petition for certiorari); *accord Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 879 (1991). The record below is sufficiently detailed to allow determination of this issue, because it poses primarily a question of law that has been extensively addressed by the various Courts of Appeals.

[9] *United States v. Bennett*, 984 F.2d 597, 606-07 (4th Cir.), *cert. denied*, 113 S. Ct. 2428 (1993); *United States v. Dischner*, 974 F.2d 1502, 1509-10 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1290 (1993); *Abell v. Potomac Ins. Co.*, 946 F.2d 1160, 1165-67 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1944 (1992); *United States v. Glecier*, 923 F.2d 496, 497 n.1 (7th Cir.), *cert. denied*, 502 U.S. 810 (1991); *United States v. Coiro*, 922 F.2d 1008, 1017 (2d Cir.), *cert. denied*, 501 U.S. 1217 (1991); *United States v. Woods*, 915 F.2d 854, 862-64 (3d Cir. 1990), *cert. denied*, 499 U.S. 947 (1991); *United States v. Angiulo*, 897 F.2d 1169, 1178-80 (1st Cir.), *cert. denied*, 498 U.S. 845 (1990).

case where there was no indication whatsoever that mailing innocent disbursement checks and two tax returns could turn a garden-variety state-law dispute solely over the proper allocation of a family partnership's profits into a federal RICO case.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 3, 1995

APPENDIX

BEST AVAILABLE COPY

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

92-1495 and 94-1529

TABAS V. TABAS

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is

O R D E R E D that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until April 5, 1995.

Judge Roth

Circuit Judge

Dated: March 14, 1995

HARRIETTE S. TABAS; RICHARD S. TABAS; NANCY C. TABAS; GERALD LEVINSON, As Executors of the Estate of CHARLES L. TABAS Appellants

v.

DANIEL M. TABAS; JOSEPH P. CAMPBELL; JAMES J. MCSWIGGAN; LEE A. TABAS; ROBERT TABAS; SUSAN TABAS TEPPER; LINDA TABAS STEMPEL; JOANNE TABAS WURZAK; CAROL STOFMAN; HOWARD WURZAK

Nos. 92-1495, 92-1529

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

January 26, 1993, Argued February 13, 1995, Filed

SUBSEQUENT HISTORY: As Amended February 23, 1995. Second Amendment March 1, 1995. Third Amendment March 7, 1995.

PRIOR HISTORY: On Appeal From the United States District Court For the Eastern District of Pennsylvania. (D.C. Civil Action No. 91-01355).

COUNSEL: Richard A. Sprague, Esquire (Argued), Daniel L. Lemisch, Esquire, Denise Pallante, Esquire, Sprague & Sprague, 135 South 19th Street, Wellington Building, Suite 400, Philadelphia, PA 19103, Howard K. Goldstein, Esquire, Astor, Weiss, Kaplan & Rosenblum, Broad Street at Walnut, The Bellevue, Sixth Floor, Philadelphia, PA 19102, Attorneys for Appellants. Harold E. Kohn, Esquire, Robert J. LaRocca, Esquire, Joanne Zack, Esquire (Argued), Kohn, Nast & Graf, P.C. 1101 Market Street, 24th Floor, Philadelphia, PA 19107, Attorneys for Appellees.

JUDGES: Before: GREENBERG, ROTH and LEWIS, Circuit Judges. Reargued In Banc October 18, 1994 Before: SLOVITER,

Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, LEWIS, ROTH, MCKEE, Circuit Judges.

OPINION OF THE COURT

ROTH, Circuit Judge:

In this action, brought under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), Pub. L. 91-452, Title IX, 84 Stat. 941, as amended, 18 U.S.C. §§ 1961-1968, we are presented with the question whether defendants' acts, as alleged, constituted a "pattern of racketeering activity." Specifically, we must determine what showing is required for plaintiffs to meet the "continuity" prong of RICO's "pattern" requirement. Because we find that plaintiffs have alleged a series of acts sufficient to satisfy RICO's continuity requirement, we will reverse the district court's grant of summary judgment and remand this case for further proceedings consistent with this opinion.

The plaintiffs are four of the executors of the Estate of Charles Tabas ("the Estate"): Charles's widow, Harriette Tabas; Richard Tabas and Nancy Tabas, two of Charles and Harriette's children; and Gerald Levinson, one of Charles's business associates.[1] In addition to Daniel Tabas, who is President and Executive Officer of Tabas Enterprises, the named defendants include Joseph Campbell, the Executive Vice President of Tabas Enterprises; James McSwiggan, the Comptroller of Tabas Enterprises; Daniel's children; and one of Daniel's sons-in-law.

I.

A.

In 1964, brothers Charles and Daniel Tabas formed a partnership, Tabas Enterprises, to conduct real estate and other

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[1] There are six heirs to the Estate, including the Charles L. Tabas Foundation.

business ventures. The partnership agreement governing the brothers' joint property holdings required that, in the event of the death of either partner, the surviving partner would distribute partnership income equally to himself and to the estate of the deceased partner, regardless of any personal services either brother might render. See Appendix ("App.") at 62 (Partnership Agreement ¶ 3). The partnership agreement also provided that:

> It is the intent of the parties that the survivor of them shall be free to exercise his judgment for the joint benefit of ownership . . . provided always, that the responsibility and obligation of the survivor to the estate of the deceased shall be that required of a fiduciary.

App. at 62 (Partnership Agreement ¶ 4(b)).

In 1983, Charles Tabas died. Soon after Charles's death, John Van Der Wal, a financial advisor to Daniel and to Tabas Enterprises, was asked by Daniel to recommend a reasonable financial arrangement between Daniel and Charles's widow, Harriette. In response, Van Der Wal sent a letter to Harriette in which he recommended that Daniel receive a $180,000 annual management fee from Tabas Enterprises, prior to profit sharing by the partners. Van Der Wal further recommended that Harriette and Daniel each receive a $10,000 monthly draw check from Tabas Enterprises.[2]

Beginning in March 1983, monthly distribution checks of $10,000 were drawn on a Tabas Enterprises account and sent to Harriette through the United States mail. Daniel was also provided with a $10,000 monthly draw. In addition, from March

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[2] Prior to Charles's death, each brother received a monthly disbursement of $10,000 from Tabas Enterprises. In addition, the brothers appeared to have an arrangement under which Tabas Enterprises paid for many personal and business expenses.

1983 to September 1986, Tabas Enterprises paid for various personal expenses incurred by Harriette and Daniel.

In September 1986, Tabas Enterprises stopped paying Harriette's personal expenses and also eliminated Harriette's $10,000 monthly draw. Instead, Tabas Enterprises began paying a $15,000 monthly draw to the Estate. At the same time, Daniel's monthly draw was increased to $15,000. Tabas Enterprises continued to pay Daniel management fees and to cover his personal expenses.[3]

Shortly thereafter, the Estate brought suit against Daniel and others in the Montgomery County, Pennsylvania, Court of Common Pleas. The complaint alleged, inter alia, that the Estate was not being allocated an equal share of the partnership income, that Daniel used Tabas Enterprises funds for personal purposes, that Daniel misled the Estate by directing the preparation of false and misleading financial statements, and that Daniel had breached his fiduciary duties to the Estate.

On November 20, 1987, the parties settled the state suit and agreed that the assets of Tabas Enterprises would be sold. The

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[3] The parties dispute whether plaintiffs were aware that Daniel was receiving substantial compensation from Tabas Enterprises in addition to his monthly draw check. Defendants argue that, soon after Charles's death, plaintiffs knew of Daniel's compensation and therefore could not have been deceived by the monthly checks which served as the basis of the mail fraud predicate acts. Plaintiffs acknowledge that they believed Daniel was taking more than he was entitled to under the partnership agreement; this was partly the basis for the 1986 state suit. They contend, however, that they did not know the extent to which they were being short-changed until Price Waterhouse was given access to Tabas Enterprises' records. Consequently, plaintiffs assert that they initiated this suit as soon as they discovered the extent of the alleged fraudulent activity.

settlement agreement established a schedule and method for liquidating the majority of the jointly held properties.[4] In conjunction with the liquidation of the joint assets, the settlement agreement provided that "the Estate shall be given complete access to all properties, books and records in connection therewith[.]" App. at 67 (Settlement Agreement at ¶ 4(a)(i)). The settlement agreement did not address the distribution of income earned after November 20, 1987, but did provide that:

> To the extent that the Partnership Agreement dated March 12, 1964 is not inconsistent with the provisions of this [Settlement] Agreement, the Partnership Agreement shall continue in full force and effect until the liquidation and auction [of Tabas Enterprises' assets] are completed.

App. at 70 (Settlement Agreement ¶ 13). Another provision of the settlement agreement provided that the parties would agree to execute a mutual general release:

> requiring the dismissal with prejudice of all parties in all litigation between or among Daniel, on the one hand, and the Estate or any of its executors, on the other hand, and excluding only the terms and conditions contained herein.

App. at 69 (Settlement Agreement ¶ 9).

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[4] The settlement agreement also provided that Daniel would purchase the Estate's interest in Acorn Iron and Supply Company and $1.5 million in Royal Bank stock. In addition, the Estate's interest in property on City Line Avenue was transferred to Daniel, apparently in exchange for monies from Tabas Enterprises. Defendants, pointing to the $16.9 million that the Estate has received pursuant to the settlement agreement and liquidation of Tabas Enterprises, assert that plaintiffs have been treated equally. While plaintiffs do not appear to dispute the amount the Estate has received, they do assert that it has not received an equal one-half of the income as required under the partnership agreement.

Lastly, the Honorable William H. Yohn, Jr.,[5] was named to act as the arbitrator of any future disputes arising from the implementation of the settlement agreement that could not be resolved by the parties' legal representatives. The settlement agreement specifically provided that Judge Yohn's decisions on such matters "shall be final, binding, and non-appealable." App. at 70 (Settlement Agreement ¶ 12).

On May 15, 1990, Daniel and the Estate executed the mutual general release, which provided that, except for the obligations of the parties under the settlement agreement, the parties would release and forever discharge one another from:

> any and all actions, causes of action, demands, judgments, contracts, debts, dues, accounts, bonds, covenants, contracts, suits, claims, and demands of any nature whatsoever, whether in law, equity, arbitration or otherwise, whether know [sic] or unknown at the present time, which [either party] ever had, now has, hereinafter can, shall or may have, by reason of any matter, cause or thing whatsoever, *from the beginning of the world to November 20, 1987.*

App. at 293 (emphasis added).

Despite the settlement agreement, plaintiffs remained dissatisfied with Daniel's compliance with the partnership agreement. On July 25, 1990, Judge Yohn held a hearing to consider whether the settlement agreement barred the Estate from asserting claims for breach of the partnership agreement stemming from Daniel's management of Tabas Enterprises subsequent to November 20, 1987. Finding that "the provision of the partnership agreement of March 12, 1964 concerning

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[5] At that time, Judge Yohn sat on the Pennsylvania Court of Common Pleas. He is now a United States District Judge for the Eastern District of Pennsylvania.

distribution of income is not inconsistent with the provisions of the settlement agreement . . . as the settlement agreement contains no provisions concerning the distribution of income after November 20, 1987," Judge Yohn held that the Estate could "pursue any claims" against Daniel arising from the distribution of Tabas Enterprises' income after November 20, 1987. App. at 1187 (Arbitration Award No. 8).[6]

Following this decision, Daniel's counsel requested that Judge Yohn mediate the issues raised by plaintiffs' proposed RICO complaint. Judge Yohn held two conferences with counsel to discuss, among other topics, the proposed RICO claims. During oral argument on February 1, 1991, Daniel's counsel asserted that, because plaintiffs' proposed RICO complaint sought damages against defendants not named in the settlement agreement, the proposed RICO complaint was outside the scope of arbitration and therefore could not be decided by Judge Yohn in his role as arbitrator. Nevertheless, Daniel's counsel expressed interest in having Judge Yohn serve as a mediator in an attempt to resolve the claims set forth in the proposed RICO complaint.

On February 20, 1991, Judge Yohn formally denied Daniel's request to mediate the dispute. Instead, Judge Yohn ordered that: "By agreement of the parties, and with the concurrence of the undersigned, the proposed 'RICO Complaint' may be filed in the United States District Court for the Eastern District of Pennsylvania and the issues raised therein will not be the subject of this procedure under the [Settlement] Agreement of November 20, 1987." App. at 1282 (Arbitration Award No. 10).

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[6] These rulings were premised upon Judge Yohn's finding that: "By agreement of the parties and with the concurrence of the arbitrator, the arbitrator has jurisdiction to rule upon the issue of whether the Estate may make claims against Daniel M. Tabas concerning his management of Tabas Enterprises subsequent to November 20, 1987." App. at 1185.

Soon thereafter, plaintiffs brought the instant action, alleging violations of RICO §§ 1962(a), (b), (c), and (d), as well as several state law claims stemming from defendants' handling and distribution of Tabas Enterprises assets. The initial complaint was filed on March 4, 1991. The amended complaint was filed on May 20, 1991.[7]

Plaintiffs have appealed the district court's grant of defendants' motion for summary judgment. On appeal, we are required to base our review of the district court's decision on the evidence of record. Accordingly, before we turn to the merits of the parties' assertions, we will summarize the record submitted to this court.

Most significantly, the record contains two financial reports by Price Waterhouse, analyzing Tabas Enterprises' financial and operational records. Plaintiffs' counsel retained Price Waterhouse to determine whether these records reflected the equal distribution of income to the Estate as required under ¶ 3 of the partnership agreement.

The first Price Waterhouse report analyzed Tabas Enterprises' financial records dating from Charles's death in 1983 through early 1990, focusing on the period after November 20, 1987. Then, in late 1991, after the amended complaint was filed, Price

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[7] On May 29, 1991, the district court entered a scheduling order. This schedule provided, inter alia, that discovery be completed by December 2, 1991. The schedule also provided that defendants' motion for summary judgment had to be filed on or before October 21, 1991, and that plaintiffs' response was due by November 4, 1991. Because this schedule required plaintiffs to respond prior to the completion of discovery, and because the parties had further disagreements about discovery, the factual record is not fully developed. Nonetheless, the record is sufficient to support our conclusion that the requisites for RICO continuity have been met.

Waterhouse completed a supplemental report, analyzing Tabas Enterprises' records from October 1989 through July 1991. In total, the Price Waterhouse reports documented more than three and one-half years of activity subsequent to the November 1987 settlement agreement. In both reports, Price Waterhouse concluded that "the books and records of Tabas Enterprises do not reflect the equal distribution of income," and that "indications of fraud exist."[8] App. at 352, 460-61.

The Price Waterhouse reports revealed a continuing series of transactions to divert Tabas Enterprises' income for the personal use of Daniel and his family, through direct monetary benefits as well as other types of benefits. In its first report, for instance, Price Waterhouse itemized a substantial number of items, purchased with Tabas Enterprises' income, for which there was no adequate documentation or explanation substantiating an ordinary and necessary business purpose for the expense. The report noted that, to the extent that Daniel purchased these items using Tabas Enterprises' income, such expenses "would inappropriately reduce the Estate's interest in Tabas Enterprises by reducing income available for distribution to the Estate." App. at 354. According to the Price Waterhouse report, these purchases included personal apparel, homeowner's dues for Daniel's vacation home in Vermont, meals and other purchases in cities where Daniel had vacation homes, meals and other

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[8] Price Waterhouse noted that its formal "opinion" was subject to scope limitations as discussed within each report. Our review of these limitations indicates that most were caused by Tabas Enterprises' failure to cooperate with the Price Waterhouse auditors. In addition, Price Waterhouse described Tabas Enterprises' major records depository as in a "state of disarray." In considering these reports, we will weigh the effect of the scope limitations in light of our conclusion that most limitations to the analysis were a result of Tabas Enterprises' efforts to hinder the Price Waterhouse audits.

purchases in ten foreign countries, prescription medicine, and a pool heater installed at Daniel's home in Pennsylvania. The total cost of these and other similar expenses was approximated at $140,000.

Other problem areas cited in the first report were Tabas Enterprises' payment of $67,000 in compensation for the provision of home services, such as maid, gardening, and handyman services, for Daniel and his family; the assignment of 24 automobiles owned by Tabas Enterprises to Daniel and his family, including family members who were not employed by Tabas Enterprises; Tabas Enterprises' payment of the automobile insurance, repairs and maintenance, gasoline,[9] car phones, auto club membership, registration fees, tags, and title fees for all 24 cars; Tabas Enterprises' payment of telephone bills for Daniel's primary and vacation residences; and Tabas Enterprises' payment of insurance coverage for non-partnership assets, including Daniel's six antique automobiles.

Price Waterhouse's second report noted that, between the completion of the first and second reports, Daniel had reimbursed Tabas Enterprises for only a small portion of these expenses.[10] The second report also noted that many of the questionable expenses detailed in the first report continued to occur. For instance, the second report identified an additional $78,000 in payments for personal services and an additional $35,000 in phone bills for Daniel's private residences and mobile telephones.

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[9] The report found these gasoline charges, in excess of $18,000, especially problematic, since the relevant documents revealed routine submissions of multiple requests for reimbursement arising from a single receipt.

[10] In his deposition, Daniel testified that all unreimbursed expenses represented legitimate business expenses. For most of these expenses, however, Daniel could not provide any specific recollection of the business purpose involved.

The second report also noted that Daniel and his family continued to charge personal items to Tabas Enterprises, including personal apparel, homeowner's dues for his vacation home in Vermont, and meals.

In addition to investigating non-monetary benefits, the Price Waterhouse reports also examined the direct monetary benefits received by Daniel and his family from Tabas Enterprises. The reports found that between November 1987 and November 1989, Daniel received $1,502,000 in salary partnership distributions, management fees and incentives, gratuities, and bonuses from Tabas Enterprises, and that for the period between November 1989 and June 1991, he received $1,166,000. The reports also found that, during this period, in which Daniel was paid a total of $2,668,000, the Estate received partnership distributions totalling $660,000.[11]

According to the Price Waterhouse reports, the monetary payments to Daniel's family during this time also eclipsed those received by the Estate. The reports documented that between November 1987 and June 1991, Daniel's family, including his six children and one son-in-law, received $1,363,000 from Tabas Enterprises in the form of salaries, management fees and incentives, gratuities, bonuses, and consulting fees. The amended complaint alleges that payments to Daniel's children and son-in-law "do not constitute reasonable salaries for work which they actually performed and that some of those children and/or their spouses were 'phantom' or 'ghost' employees who

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[11] Price Waterhouse also noted that, in addition to his Tabas Enterprises income, Daniel received compensation as Chairman of the Board of Royal Bank. At his deposition, Daniel testified that he worked 60-70 hours per week for Tabas Enterprises, app. at 1683, and that his Royal Bank time commitment consisted of Thursday morning executive staff meetings and a board meeting one evening each month. App. at 614.

performed little or no work at all." App. at 21 (Amended Complaint ("AC") ¶ 25).

The first Price Waterhouse report also noted that, in addition to receiving compensation from Tabas Enterprises, certain members of Daniel's family also worked for and received compensation from Royal Bank. For instance, Lee Tabas served as President of Royal Bank, Robert Tabas served as Vice President, and Susan Tabas Tepper served as Director of Marketing.

Finally, in addition to the above findings, both Price Waterhouse reports noted that "the Estate may also have been subjected to the risk of additional taxes, interest, and penalties" due to apparent Internal Revenue Service reporting violations by Tabas Enterprises. App. at 362, 467.

B.

Count I of the amended complaint alleges that, in violation of 18 U.S.C. § 1962(a), (b), and (c), the defendants conspired to defraud the Estate of its equal share of Tabas Enterprises' income, to which it was entitled under the partnership agreement, through a pattern of racketeering activity including mail fraud in violation of 18 U.S.C. § 1341.[12] Specifically, plaintiffs allege that defendants conducted a scheme to defraud the Estate of its equal share of the partnership's income by wrongfully diverting

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[12] Count II of the amended complaint alleges that defendants violated § 1962(d) by conspiring to violate subsections (a), (b), and (c). Counts III-VI of the amended complaint allege state law claims that are not central to this appeal, including breach of fiduciary duty, breach of contract, fraud, and conversion. The district court dismissed these state law claims without prejudice. Because we find that the district court erred in dismissing Counts I and II, we will instruct the district court to vacate the dismissal of plaintiffs' supplemental state law claims.

Tabas Enterprises funds to pay for the personal expenses of Daniel and his family and by understating the Estate's share of the income. Plaintiffs assert that, from the time of Charles's death through the period in which the amended complaint was filed, Daniel "continuously made false representations to the Estate by mail and fraudulently distributed millions of dollars of Tabas Enterprises' funds to himself and to members of his family in a scheme to defraud the Estate of income to which it was entitled." App. at 20 (AC ¶ 24).

Plaintiffs specifically allege that Daniel, Campbell, and McSwiggan committed forty-one acts of mail fraud between December 1987 and February 1991 for "the purpose of executing the scheme to defraud the Estate of its equal share of income." App. at 43 (AC ¶ 49).[13] Thirty-nine of these forty-one acts represented monthly disbursements of $15,000 from Tabas Brothers (a holding of Tabas Enterprises) to the Estate. The remaining two acts involve the mailing of various IRS forms from Tabas Enterprises to the Estate reflecting income earned and business expenses incurred by certain Tabas Enterprises entities. Plaintiffs contend that the mailing of the monthly checks by defendants "constituted an intentional misrepresentation" that one-half of the income of Tabas Enterprises was being paid to the Estate pursuant to the partnership agreement. App. at 46 (AC ¶ 50).

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[13] Plaintiffs also allege as predicate acts defendants' use of the United States mails to send checks to Daniel's children and son-in-law for work not performed. We do not rely on these allegations, however, because plaintiffs have not produced any evidence to counter McSwiggan's deposition testimony that these checks were delivered by courier. *See, e.g., Utz v. Correa*, 631 F. Supp. 592, 596 (S.D.N.Y., 1986) (delivery of letter by messenger did not violate the mail fraud statute since the United States mails were not used).

Finding that the dispute did not present a sufficient threat to satisfy RICO's "continuity" requirement, the district court granted defendants' summary judgment motion. The district court reasoned that:

> Plaintiffs' claims essentially allege one fraudulent scheme perpetrated against one victim by one perpetrator. The gist of plaintiffs' complaint is that Daniel Tabas has failed to abide by the partnership agreement made with his brother, Charles, and that Daniel has employed various methods of trickery to cheat Charles's heirs of their fifty percent share of the business that Charles and Daniel built. The sole victim of this scheme is Charles Tabas's estate. The sole perpetrator is Daniel Tabas or individuals under his control. No one else is affected. There is no threat to the community at large. This is not a case where the predicate acts are "part of an entity's regular way of doing business," such as would affect others doing business with the entity.
>
> The partnership between Charles and Daniel is currently in the process of liquidation. All of the fraudulent activity alleged in this suit will cease once the liquidation process is complete. Given the Court of Appeals' admonition that "it remains an open question whether RICO liability is ever appropriate for a single-scheme, single-victim conduct threatening no future harm," we simply do not find that the defendants' alleged conduct in this case "poses a societal threat worthy of the draconian penalties and remedies available under RICO."

District Court opinion at 8-10; App. at 1376-78 (citations omitted) (footnotes omitted). Plaintiffs filed a timely notice of appeal of the district court's grant of summary judgment to defendants. Defendants also filed an appeal, seeking review of the district court's decision to dismiss the state claims without prejudice. Following the filing of the panel's decision, we granted

appellants' petition for rehearing in banc and vacated the panel opinion.

II.

The district court had subject matter jurisdiction over this civil action pursuant to 28 U.S.C. §§ 1331 and 1367. The district court's federal question jurisdiction was invoked because Counts I and II of the amended complaint raise claims under RICO, 18 U.S.C. §§ 1961 and 1962. The district court's supplemental jurisdiction was invoked because Counts III through VI of the amended complaint raise claims that are so related to the claims in Count I and II that they form part of the same case or controversy under Article III of the United States Constitution. Under 28 U.S.C. § 1291, this Court has appellate jurisdiction over the final orders of the district court.[14]

This Court has plenary review over the district court's grant of summary judgment. *See Northern Ins. Co. v. Aardvark Assocs.*, 942 F.2d 189, 194 n.5 (3d Cir. 1991). On review of the district court's order for summary judgment, "we 'apply the same test the district court should have utilized initially.'" *Erie Telecommunications v. Erie*, 853 F.2d 1084, 1093 (3d Cir. 1988) (citation omitted). "In reviewing a grant of summary judgment, we must be convinced 'that the prevailing party has successfully demonstrated that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" *Id.* (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *Celotex Corp.*

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[14] The district court's first order, dated May 26, 1993, granted defendants' motion for summary judgment on Counts I and II, and dismissed Counts III, IV, and V pursuant to 28 U.S.C. § 1367(c)(3). The district court's second order, dated June 2, 1993, amended the first order to include dismissal of Count VI pursuant to § 1367(c)(3).

v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)).

In determining whether summary judgment is appropriate, "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson*, 477 U.S. at 255. The inquiry is "whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-52.

III.

The first issue we must address is defendants' contention that this lawsuit is precluded by the 1987 settlement agreement and the 1990 mutual release. This question was considered by the panel only. We find defendants' argument to be without merit.

First, binding arbitration by Judge Yohn holds the present claims viable. The settlement agreement provides for final, binding arbitration of any dispute "as to the provisions of this Agreement or as to the implementation or operation of the provisions of this Agreement" between Daniel and the Estate. App. at 70 (Settlement Agreement ¶ 12). The very issue of whether claims such as this lawsuit could be brought was submitted to Judge Yohn, the arbitrator, who determined initially that "the arbitrator has jurisdiction to rule upon the issue of whether the Estate may make claims against Daniel M. Tabas concerning his management of Tabas Enterprises subsequent to November 20, 1987." App. at 1185 (Arbitration Award No. 8). On the merits, Judge Yohn held that the Estate could pursue any claims which it might have against Daniel "for an alleged breach of his fiduciary duty [to the Estate] after November 20, 1987," and "for the unequal distribution of the income of Tabas Enterprises subsequent to November 20, 1987." *Id.* at 1187.

Under the settlement agreement, Judge Yohn's decision is "final, binding, and non-appealable," app. at 70 (Settlement

Agreement ¶ 12), and we must adhere to it under federal and Pennsylvania law. *See Apex Fountain Sales v. Kleinfeld*, 818 F.2d 1089, 1094-95 & n.4 (3d Cir. 1987) (an arbitrator's decision is binding under federal law unless "an arbitrator 'manifests an infidelity'" to her obligation to interpret the agreement at issue, or there is "corruption, fraud or partiality," or a party was denied a "fundamentally fair hearing") (citation omitted); *International Brotherhood of Firemen & Oilers v. School Dist.*, 465 Pa. 356, 350 A.2d 804, 808 (Pa. 1976) (an arbitrator's decision shall not be set aside "unless it is alleged and proven by clear, precise and convincing evidence that the parties were denied a hearing or that there was fraud, misconduct, corruption or some other irregularity of this nature on the part of the Arbitrator which caused him to render an unjust, inequitable or unconscionable finding"). Defendants have not alleged any action on the part of Judge Yohn amounting to corruption, fraud, or partiality. In addition, defendants have presented no evidence that Judge Yohn failed to provide a hearing to consider each party's views prior to his decision. In fact, the record clearly indicates that Judge Yohn held a hearing on this question and considered numerous exchanges of correspondence before ruling on this matter.

Second, even if we were to make our own evaluation of whether the 1987 settlement agreement and the 1990 release precluded this lawsuit, we would conclude that it does not. Defendants' reliance on *Main Line Theatres, Inc. v. Paramount Film Distrib. Corp.*, 298 F.2d 801 (3d Cir.), *cert. denied*, 370 U.S. 939, 8 L. Ed. 2d 807, 82 S. Ct. 1585 (1962), is misplaced. Defendants assert that *Main Line* stands for the proposition that where "the initial lawsuit contained prayers for injunctive relief, the execution of a general release releases and extinguishes complaints for future conduct." Defendants-appellees' Brief at 21. Consequently, defendants contend, plaintiffs' suit is barred by the settlement agreement and the mutual release signed by the Estate and Daniel.

In *Main Line*, plaintiffs demanded injunctive relief and treble damages in a civil antitrust suit stemming from Paramount's distribution of motion pictures. The district court dismissed the suit, holding that the case had been settled during pre-trial negotiations by an "oral agreement" between the parties. The oral agreement provided that Main Line would drop its suit in exchange for $10,000. Main Line refused to comply with the oral agreement, however, complaining that Paramount attempted to add language to the agreement when it was memorialized in writing. Specifically, Main Line rejected language that required it to acknowledge that the complained of distribution procedures were reasonable.

Main Line appealed the dismissal to this court. We then considered whether the initial oral agreement included a release to the effect that Paramount could continue to distribute films in the same manner it had prior to Main Line's suit for injunctive relief. We noted:

> Had this been an action for damages only, without a prayer that the defendants be restrained from continuing or repeating the licensing practices of which the plaintiff complained, the essential feature of any understanding to settle the suit for a stated sum would have been the plaintiffs' promise to forego a money claim, the only matter in controversy. Here, the suit contained a demand for injunctive prohibition of future wrongful conduct as well as a claim for money damages for alleged past misconduct. In such circumstances a reasonable person agreeing, *without any expression of limitation*, to accept a sum in settlement of the litigation should and reasonably would understand that both aspects of the suit were covered by the settlement.

298 F.2d at 803 (emphasis added).

In *Main Line*, plaintiffs could point to no limitations, expressed or implied, in their oral agreement with defendants.

Accordingly, their settlement agreement covered their prayers for both injunctive relief and money damages. In the present case, however, the mutual release signed by plaintiffs and Daniel expressly limits the applicability of the release to any claims arising "from the beginning of the world to November 20, 1987." App. at 294. This express limitation distinguishes the instant case from the facts presented in *Main Line*.

Defendants also draw the Court's attention to our statement in *Main Line* that "certainly, a defendant offering a sum in settlement of a suit asking, among other things, *for an injunction against similar conduct*, would not understand that a similar demand could be asserted the day after settlement." 298 F.2d at 803 (emphasis added). The Estate's state suit here, however, although denominated a "Complaint in Equity," did not seek broad injunctive relief. The holding in *Main Line* relies on the fact that the plaintiff specifically sought to enjoin Paramount from distributing motion pictures using methods that plaintiff alleged violated the civil antitrust laws. In the instant case, the plaintiffs' state suit asked that Daniel be removed from any position at Tabas Enterprises and that its businesses and properties be liquidated. Rather than controlling future conduct, the state suit primarily sought a dissolution of Tabas Enterprises and redress for the alleged past wrongs committed against the Estate's interest in the partnership. It follows, therefore, that the subsequent federal action did not constitute an effort to enjoin conduct that the settlement of the first suit had resolved. This determination, together with our earlier finding that the settlement agreement bars only claims existing up to November 20, 1987, would lead us to conclude that defendants' reliance upon *Main Line* is misplaced.

IV.

Having found that plaintiffs' lawsuit is not precluded by the 1987 settlement agreement and the 1990 mutual release, we now turn to the district court's decision that plaintiffs failed to allege

a course of conduct sufficient to establish a RICO "pattern of racketeering conduct" because plaintiffs failed to satisfy RICO's "continuity" requirement.

The RICO statute provides for civil damages for "any person injured in his business or property by reason of a violation of [18 U.S.C. § 1962]." 18 U.S.C. § 1964(c). A common thread running throughout § 1962 is that an injured party must demonstrate that the defendant was engaged in a "pattern of racketeering activity." Section 1962(a) prohibits "any person who has received any income derived . . . from a pattern of racketeering activity" from using that money to acquire or operate any enterprise engaged in interstate commerce. Section 1962(b) prohibits any person from acquiring, maintaining an interest in, or controlling any such enterprise "through a pattern of racketeering activity." Section 1962(c) prohibits any person employed by or associated with an enterprise engaged in interstate commerce from conducting or participating in the affairs of the enterprise through "a pattern of racketeering activity." Finally, section 1962(d) prohibits any person from conspiring to violate subsections (a), (b), or (c).

Central to the dispute in this case is the question whether defendants participated in "a pattern of racketeering activity." The RICO statute defines a "pattern" of racketeering activity as requiring "at least two acts of racketeering activity" within a ten year period. 18 U.S.C. § 1961(5). The statute also enumerates the offenses which constitute "racketeering activity," including crimes that have traditionally been associated with the transgressions of racketeers: murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, and dealing in narcotic or other dangerous drugs. 18 U.S.C. § 1961(1). The statutory enumeration is, however, expansive and goes on to include specific federal offenses which, although they may often be committed by those whom we would categorize as "racketeers," also fall into the category of common law or

"garden variety" fraud and which would, in the past, have been the subject of commercial litigation under state law. Among these broadly delineated federal offenses are mail fraud and wire fraud.[15] These offenses are the ones that many consider to be

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[15] Mail fraud, 18 U.S.C. § 1341, is the racketeering activity involved in the case before us. Section 1341 provides in pertinent part:

> Whoever, having devised . . . any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice . . . places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, . . . shall be fined not more than $1,000 or imprisoned not more than five years, or both.

The federal offense of mail fraud was originally enacted by Congress in 1872 as a part of the recodification of the postal laws. The Supreme Court in its first review of the mail fraud statute made clear that its scope was broad. The Court held that the statute reached beyond the common law definition of "false pretences" to encompass "everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future." *Durland v. United States*, 161 U.S. 306, 313, 40 L. Ed. 709, 16 S. Ct. 508 (1896). Fraud, involving the use of the postal system to carry it out, was made a federal offense by Congress with the "purpose of protecting the public against all such intentional efforts to despoil, and to prevent the post office from being used to carry them into effect . . . ." *Id.* at 314.

Judge Greenberg, in his dissent, queries whether Congress intended RICO to be applied to a defendant, participating in a scheme to defraud, who mails substantial payments but not to a similar defendant who delivers the payments by hand. See

(continued...)

the most troublesome as RICO predicate acts. The inclusion within the scope of civil RICO of these types of fraud, more prevalent in the commercial world than in the world of racketeers, has caused concern that RICO sweeps too broad a swathe. *See, e.g.*, Note, *Civil RICO: The Temptation and Impropriety of Judicial Restriction*, 95 Harv. L. Rev. 1101, 1105 (1982) ("Given the prevalence of mail and wire use in commercial transactions, RICO's provision for a private cause of action predicated on violations of the mail and wire fraud statutes virtually federalizes common law fraud").

If we examine the language of the statute itself, in an attempt to discern the scope of civil RICO, we find ourselves lost in a land with few signposts. Section 1961(5) defines "pattern" as requiring "at least two acts of racketeering activity." The breadth of the predicate acts, described in § 1961(1), combined with § 1961(5)'s loose definition of pattern, has led many courts to recoil from the inclusion within RICO of offenses which were not considered to be the crimes of gangsters. Such court-imposed limitations on the scope of civil RICO were first reviewed by the Supreme Court in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 87 L. Ed. 2d 346, 105 S. Ct. 3275 (1985). In *Sedima*, the Supreme Court set out an expansive definition of the concept of "pattern" in civil RICO.

Sedima arose from an action filed in the Eastern District of New York by a Belgian corporation, based on § 1964(c) and (d) and predicate acts of mail fraud and wire fraud, charging that Imrex, Sedima's partner in a joint venture, had presented inflated bills and had cheated Sedima out of a portion of its proceeds by

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[15](...continued)

[typescript at 14]. The clear answer to this question is "yes" because, first, the former example constitutes mail fraud and the latter does not and, second, Congress has chosen to include mail fraud as a RICO predicate act.

collecting for nonexistent expenses. The district court dismissed the RICO counts for failure to state a claim, holding that a RICO-type injury must be based on allegations of some sort of distinct "racketeering injury" or "competitive injury." 574 F. Supp. 963, 965 (1983). The dismissal was affirmed by a divided panel of the Second Circuit Court of Appeals. 741 F.2d 482 (1984). The court of appeals clarified the type of injury which it required to be alleged, finding that "it is better to identify the RICO standing requirement as 'racketeering injury' requirement rather than a 'competitive injury' requirement. . . ." *Id.* at 496. The court of appeals further required that, before a private civil RICO action could be brought, the plaintiff must show that the defendants had been criminally convicted of the predicate acts. *Id.* at 503. The Supreme Court rejected both of these holdings.

Justice White, writing for the majority in *Sedima*, stated "we can find no support in the statute's history, its language, or considerations of policy for a requirement that a private treble-damages action under § 1964(c) can proceed only against a defendant who has already been criminally convicted." 473 U.S. at 493. Concerning the requirement of racketeering injury, Justice White stated that

> [W]e perceive no distinct "racketeering injury" requirement. Given that "racketeering activity" consists of no more and no less than commission of a predicate act, § 1961(1), we are initially doubtful about a requirement of a "racketeering injury" separate from the harm from the predicate acts. A reading of the statute belies any such requirement. . . . If the defendant engages in a pattern of racketeering activity in a manner forbidden by these provisions [§ 1962(a)-(c)], and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under § 1964(c).

> There is no room in the statutory language for an additional, amorphous "racketeering injury" requirement.

Id. at 495.

Justice White based this less restrictive reading of the statute on prior case law and the general principles surrounding the statute: "RICO is to be read broadly. This is the lesson not only of Congress' self-consciously expansive language and overall approach, but also of its express admonition that RICO is to 'be liberally construed to effectuate its remedial purposes.'" *Id.* at 497-98 (citations omitted).

The Court recognized that this interpretation of the statute would permit its use not only against mobsters and organized criminals but also against "respected and legitimate 'enterprises.'" *Id.* at 499. Nevertheless, the Court found that Congress "wanted to reach both 'legitimate' and 'illegitimate' enterprises. "The former enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences." *Id.* (citation omitted). The Court concluded:

> It is true that private civil actions under the statute are being brought almost solely against such defendants, rather than against the archetypal, intimidating mobster. Yet this defect--if defect it is--is inherent in the statute as written, and its correction must lie with Congress. It is not for the judiciary to eliminate the private action in situations where Congress has provided it simply because plaintiffs are not taking advantage of it in its more difficult applications.

Id. at 499-500 (footnote omitted).

Justice White then suggested that Congress and the courts develop a meaningful concept of "pattern" in order to narrow the scope of civil RICO:

> The "extraordinary" uses to which civil RICO has been put appear to be primarily the result of the breadth of the predicate offenses, in particular the inclusion of wire, mail, and securities fraud, and the failure of Congress and the courts to develop a meaningful concept of "pattern."

Id. at 500.

Despite this invitation from the Court, Congress to date has not chosen to enact legislation which would narrow the scope of civil RICO or to define more exactly what is "pattern." Moreover, the efforts of the courts to do so have not been entirely successful. Our attempts to design a meaningful concept of pattern have continued to collide with the broad language of the statute. In response, however, to *Sedima*, the various circuits began to structure guidelines for determining whether a RICO pattern had been established. In the Third Circuit, for instance, in *Barticheck v. Fidelity Union Bank/First Nat'l State*, 832 F.2d 36 (3d Cir. 1987), we rejected the district court's requirement in that case that there be two or more unlawful schemes, and we then set forth six factors to be used in determining whether a pattern of racketeering activity has been established in a given case. These factors are: (1) the number of unlawful acts; (2) the length of time over which the acts were committed; (3) the similarity of the acts; (4) the number of victims; (5) the number of perpetrators; and (6) the character of the unlawful activity. *Id.* at 39.

Other circuits established other criteria. In the Eighth Circuit, the test for a pattern of racketeering activity was much more restrictive: proof of multiple illegal schemes was required. *See, e.g., Superior Oil Co. v. Fulmer*, 785 F.2d 252 (8th Cir. 1986).

Following this precedent, the Eighth Circuit Court of Appeals affirmed the district's court's dismissal of petitioners' complaint in *H.J. Inc. v. Northwestern Bell Tel. Co.*, 829 F.2d 648 (8th Cir. 1987). The Supreme Court granted certiorari to resolve the conflict between the circuits over whether single or multiple schemes were required to demonstrate a RICO pattern.

In its opinion in *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 106 L. Ed. 2d 195, 109 S. Ct. 2893 (1989), the Court set out its second analysis of the requirements of civil RICO. First, as to single versus multiple schemes, the Court noted that the word "scheme" is not found in the RICO statute and indeed that what constitutes a "scheme" is to be found "in the eye of the beholder, since whether a scheme exists depends on the level of generality at which criminal activity is viewed." 492 U.S. at 241 and n.3. The Court then examined the statute and its legislative history in an attempt to determine the elements of the pattern requirement. From this review, the Court concluded that "to prove a pattern of racketeering activity a plaintiff must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity." *Id.* at 239.

Under the first, or "relatedness," requirement of the RICO statute, as interpreted in *H.J. Inc.*, predicate acts are related if they "have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *Id.* at 240 (quoting the partially repealed Title X of the Organized Crime Control Act of 1970, 18 U.S.C. § 3575, et seq.).[16]

As for the second, or "continuity," prong of the analysis, the Court in *H.J. Inc.* attempted to promulgate a somewhat flexible approach, based upon a "commonsense, everyday understanding

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[16] The parties do not dispute that the relatedness prong has been met in the present case.

of RICO's language and Congress' gloss on it." *Id.* at 241. With this analytical approach in mind, the Court decided that "what a plaintiff or prosecutor must prove is continuity of racketeering activity, or its threat, simpliciter." *Id.*

In explicating how a plaintiff could make this continuity showing, the Court described continuity as "both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." *Id.* "It is, in either case, centrally a temporal concept," *id.* at 241-42, so that a party may establish continuity as a closed-ended concept by "proving a series of related predicates extending over a substantial period of time." *Id.* at 242 (emphasis added).

Thus, *H.J. Inc.* makes clear that the continuity requirement can be met by establishing long-term criminal conduct but does not define what length of time qualifies as "substantial" for this purpose. The Court in *H.J. Inc.* also gave examples of how the threat of continued racketeering activity might be demonstrated. One example is that of a hoodlum who sells "insurance" to storekeepers to prevent the breaking of their shop windows. *Id.* Another example is that of an ongoing entity which commits the predicate acts or offenses as its regular way of doing business. *Id.* In giving this last example, the Court noted that such a business may be either a criminal or a legitimate enterprise and concluded:

> The continuity requirement is likewise satisfied where it is shown that the predicates are a regular way of conducting defendant's ongoing legitimate business (in the sense that it is not a business that exists for criminal purposes), or of conducting or participating in an ongoing and legitimate RICO "enterprise."

Id. at 243 (footnote omitted). The clear implication of this language is that the ambit of RICO may encompass a "legitimate" businessman who regularly conducts his business through

illegitimate means, that is, who repeatedly defrauds those with whom he deals and in the process commits predicate acts, for instance by using the postal service as a means of accomplishing his scheme.

The Court went on in *H.J. Inc.*, at the urging of various *amici*, to consider, and to reject, a requirement that "a defendant's racketeering activities form a pattern only if they are characteristic either of organized crime in the traditional sense, or of an organized-crime-type perpetrator, that is, of an association dedicated to the repeated commission of criminal offenses." *Id.* at 243-44. The Court found that there was no textual support in the statute for such a requirement and that the statutory language did not support the limitation that racketeering acts be the work of an association or group rather than of an individual. *Id.* at 244.

These determinations in *H.J. Inc.*, that the predicate acts may be the regular way in which a legitimate business operates and that the racketeering activities may form a pattern even though they are the acts of an individual rather than of a group or of an association, enforce the Court's holding in *Sedima* that RICO reaches both "legitimate" and "illegitimate" enterprises. The Court in *H.J. Inc.* also rejected the employment of a definitional device, such as "scheme," to delineate racketeering activity, when the device employed, like "scheme," may be manipulated to satisfy the necessary criterion. *See id.* at 241 and n.3.

Whatever view we may have of Congress's original intent in enacting the RICO statute, we feel constrained, in applying the statute today, to follow the directives given by the Court in *Sedima* and *H.J. Inc.*

Since *H.J. Inc.*, this court has faced the question of continued racketeering activity in several cases, each time finding that conduct lasting no more than twelve months did not meet the standard for closed-ended continuity. *See Hughes v.*

Consol-Pennsylvania Coal Co., 945 F.2d 594, 610-11 (3d Cir. 1991) (fraudulent conduct lasting twelve months does not establish closed-ended continuity); *Hindes v. Castle*, 937 F.2d 868, 875 (3d Cir. 1991) (eight month period of predicate acts without a threat of future criminal conduct does not satisfy continuity requirement); *Kehr Packages v. Fidelcor, Inc.*, 926 F.2d 1406, 1413 (3d Cir. 1991) (same); *Banks v. Wolk*, 918 F.2d 418, 422-23 (3d Cir. 1990) (same); *Marshall-Silver Constr. Co. v. Mendel*, 894 F.2d 593 (3d Cir. 1990) (seven month single-victim, single-injury scheme does not satisfy continuity requirement).[17] In *Hughes*, we distinguished cases in other circuits in which closed-ended continuity had been established, noting that those cases involved conduct lasting "years, sometimes over a decade." *Hughes*, 945 F.2d at 611.

In evaluating the present case in accord with this precedent, we will first consider whether closed-ended continuity has been

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[17] In *Marshall-Silver*, we considered whether Congress intended RICO to apply in the situation of an extended scheme which posed no "significant societal threat" beyond its extended duration. 894 F.2d at 597. Because the scheme there lasted only seven months and posed no threat of recurrence, we stated that we would not resolve the "societal threat" issue. In view, however, of the Court's refusal in *Sedima* and *H.J. Inc.* to require racketeering injury, or prior conviction of the predicate acts, or multiple schemes, or racketeering acts by an association or group rather than by an individual, we cannot conclude that, in order to satisfy the RICO continuity requirement, the Court would require the existence of a "societal threat," whatever exactly that may be, beyond the commission of the criminal predicate acts. To the extent that *Marshall-Silver* can be read to hold otherwise, it is overruled.

established. At the outset, we note that in civil RICO complaints based on predicate acts of mail fraud

> the continuity test requires us to look beyond the mailings and examine the underlying scheme or artifice. Although the mailing is the actual criminal act, the instances of deceit constituting the underlying fraudulent scheme are more relevant to the continuity analysis.

Kehr Packages, 926 F.2d at 1414.[18] Consequently, in

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[18] Defendants' assertion that the mailings involved must themselves be relied upon by the victim of the fraud in order for a RICO claim to be established is inaccurate. As this Court stated in *Kehr Packages*, "completely "innocent" mailings can satisfy the mailing element." 926 F.2d at 1415 (citing *Schmuck v. United States*, 489 U.S. 705, 715, 103 L. Ed. 2d 734, 109 S. Ct. 1443 (1989)). Indeed, mailings "designed to lull [fraud] victims into a false sense of security, postpone their ultimate complaint to the authorities, and therefore make the apprehension of the defendants less likely than if no mailings had taken place" have been found to constitute actionable mail fraud. *Kehr Packages*, 926 F.2d at 1416 n.3 (quoting *United States v. Lebovitz*, 669 F.2d 894, 896 (3d Cir.), *cert. denied*, 456 U.S. 929, 72 L. Ed. 2d 446, 102 S. Ct. 1979 (1982)).

Additionally, the use of the mails need not be an essential element of the fraudulent scheme. Rather, so long as the mailings are "incident to an essential part of the scheme," *Pereira v. United States*, 347 U.S. 1, 8, 98 L. Ed. 435, 74 S. Ct. 358 (1954), the mailing element is satisfied. This principle is elucidated by a review of the facts in *Schmuck v. United States*, 489 U.S. 705, 103 L. Ed. 2d 734, 109 S. Ct. 1443 (1989). In that case, Wayne Schmuck was engaged in a fraudulent scheme in which he would purchase used cars, roll back their odometers, and sell the cars to retailers for a price higher than their actual worth. After purchasing an automobile from Schmuck and selling it to

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determining whether or not continuity has been established in the present case, we must focus on the duration of the underlying scheme. Just as the mailings are an element of the federal offense

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[18](...continued)

a customer, the dealers, in order to complete the resale of each automobile, would submit a title application form to the Wisconsin Department of Transportation. The mailing of these forms constituted the mailing element of Schmuck's indictment on 12 counts of mail fraud. The Supreme Court found that those mailing were sufficient to sustain Schmuck's indictment on mail fraud charges, reasoning that

> Schmuck's scheme would have come to an abrupt halt if the dealers either had lost faith in Schmuck or had not been able to resell the cars obtained from him. These resales and Schmuck's relationship with the retail dealers naturally depended on the successful passage of title among the various parties. Thus, although the registration-form mailings may not have contributed directly to the duping of either the retail dealers or the customers, they were necessary to the passage of title, which in turn was essential to the perpetuation of Schmuck's scheme.

Id. at 712.

In the instant case, it is clear that the mailings were incident to an essential part of the scheme. Had the defendants failed to mail disbursement checks to plaintiffs, plaintiffs would have immediately been alerted to defendants' alleged scheme. Consequently, by virtue of the disbursements mailed to plaintiffs, defendants were allegedly able to delay discovery of their scheme to misappropriate an excessive share of the partnership's profits. The scheme could not have continued unless the checks were delivered by one means or another. As long as the method of delivery was through the United States Postal Service, defendants' alleged scheme satisfied the elements of the federal offense of mail fraud.

of mail fraud, so too is the scheme or artifice to defraud. *See* 18 U.S.C. § 1341, set out in footnote 15 *supra*. Each time defendants misrepresented the business nature of an expense, made a questionable charge, or received compensation to which they were not entitled, they lessened the income available to the Estate. Plaintiffs have provided evidence that these activities, which implemented defendants' purported scheme to defraud the Estate, lasted more than three and a half years, from November 10, 1987, to July 1991. We conclude that a scheme lasting over three years extends over a "substantial" period of time and therefore constitutes the type of "long-term criminal conduct" that RICO was enacted to address. *See United States v. Pelullo*, 964 F.2d 193, 209 (3d Cir. 1992) (holding that a jury could find a nineteen month period of racketeering activity sufficient to satisfy continuity requirement); *Swistock v. Jones*, 884 F.2d 755, 759 (3d Cir. 1989) (fourteen month period of conduct may be sufficient to establish closed-ended continuity). Accordingly, we find, from the strictly durational aspect of the scheme, that plaintiffs in the present case have made a sufficient showing to survive summary judgment on the "continuity" prong of the pattern analysis.

The Supreme Court cautions us, however, in *H.J. Inc.*, that the existence of continuity may not always be apparent. 492 U.S. at 243. For example, the statutory definition of pattern is "at least two acts of racketeering activity" within a ten year period. 18 U.S.C. § 1961(5). It is clear that ten years is a period of long duration. Yet, would two related predicate acts, one committed in February 1982 and one committed in January 1992, be sufficient to form a pattern? It would seem unlikely. Indeed, Justice White noted in a footnote that, while § 1961(5) defines a pattern of racketeering activity as requiring at least two acts of racketeering activity, two acts may not be sufficient. 473 U.S. at 496 n.14.

The question remains, then, what more is required in order to evaluate whether continuity has been established when predicate acts have occurred over a period of several years. One helpful consideration can be found in the Court's requirements for open-ended continuity. In *H.J. Inc.* the Court states that open-ended continuity is established when the commission of the predicate acts is "a regular way of conducting defendant's ongoing legitimate business." 492 U.S. at 243. It would seem a valid analogy that, if the predicate acts have been a regular way of conducting defendant's legitimate business over a long period in the past, the RICO pattern has been satisfied.[19] In such a case, the relatedness and the frequency of the predicate acts would have created the pattern of racketeering activity. From our review of the record in the present case, we find that the allegations made by plaintiffs concerning defendants' manner of doing business over this period satisfy such a RICO continuity requirement.[20]

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[19] In making this analogy, we in no way imply that the predicate acts must constitute a "regular way" of a defendant's doing business. We merely give one example of the manner in which "pattern" may be demonstrated.

[20] The district court, in granting summary judgment to defendants, found that "this is not a case where the predicate acts are "part of an entity's regular way of doing business," such as would affect others doing business with the entity." App. at 1377 (citing H.J. Inc., 492 U.S. at 242). *See supra* at page [typescript at 16].

To the extent that the district court suggests that effects upon others doing business with the entity are relevant to a finding of "continuity," we are not certain if the district court is requiring that those affected be outsiders doing business with the entity, as opposed to investors or partners in or beneficiaries of the entity. If so, we find no support in *H.J. Inc.* for such a requirement. The implication of the cited passage in *H.J. Inc.* does not limit its

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Moreover, even if we were not to have found that conduct lasting three and one-half years was sufficient to establish closed-ended continuity, we conclude that continuity still would have been established for the purposes of summary judgment in the present case under an "open-ended" continuity analysis. Under *H.J. Inc.*, if a RICO action is brought before a plaintiff can establish long-term criminal conduct, the "continuity" prong may still be met if a plaintiff can prove a threat of continued racketeering activity. Whether the predicate acts constitute a threat of continued racketeering activity depends on "the specific facts of each case," 492 U.S. at 242, but *H.J. Inc.* suggests that open-ended continuity may be satisfied "where it is shown that the predicates are a regular way of conducting defendant's ongoing legitimate business . . . or of conducting or participating in an ongoing and legitimate RICO 'enterprise.'" *Id.* at 243.

Mindful that *Kehr Packages* instructs us, in determining continuity, to focus on the mail fraud element of the underlying fraudulent activity as well as on the element of the mailings, we are persuaded that the evidence here meets the standard for open-ended continuity. Plaintiffs have presented evidence that defendants continuously took questionable expenses, which directly affected the partnership income available to the Estate. Both Price Waterhouse reports are replete with examples of

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[20](...continued)

holding to require that the effect be on those who are doing business with the entity.

If, on the other hand, the district court was making a finding of fact on the scope of the defendants' regular way of doing business, i.e., that the alleged scheme to defraud the Estate and its beneficiaries, through the repeated actions described by Price Waterhouse, did not constitute defendants' regular way of doing business, then in view of the facts of record, we must conclude that such a finding of fact is clearly erroneous.

expense charges taken by defendants for which there is not adequate documentation or explanation to substantiate an ordinary and necessary business purpose. These included trips, meals, home services, cars, gasoline, insurance expenditures, and telephone bills.

At this stage of the litigation, we must view the facts in the light most favorable to plaintiffs, the non-movants, *i.e.*, that as a regular way of doing business, defendants were fraudulently misrepresenting expenditures to benefit themselves and to deprive the Estate and its beneficiaries of their legitimate share of the profits of Tabas Enterprises. The evidence in the record is clear that these practices, defendants' regular way of doing business, continued even after plaintiffs' complaint was filed. As a consequence, plaintiffs have established a threat of continuing fraudulent conduct as required under an "open-ended" continuity analysis.

Because we have found a pattern of racketeering activity in both the duration of and the on-going threat implicit in defendants' regular way of doing business, we will not go on to analyze this case under the six *Barticheck* factors. The fact that we do not employ the *Barticheck* factors in our analysis here does not, however, mean that they might not be relevant in a different case in determining if continuity exists. As the Court noted in *H.J. Inc.*, in those cases where relatedness and continuity are in doubt, other factors should be examined to discern if there is a "pattern of racketeering activity" under RICO:

> The limits of the relationship and continuity concepts that combine to define a RICO pattern, and the precise methods by which relatedness and continuity or its threat may be proved, cannot be fixed in advance with such clarity that it will always be apparent whether in a particular case a "pattern of racketeering activity" exists.

492 U.S. at 243. It is helpful, therefore, when determining whether "relatedness" or "continuity" has been proven, to use a

fact-oriented, case-by-case approach to determine whether there is a "pattern of racketeering activity."[21]

In the present case, we find that plaintiffs have clearly presented evidence that is legally sufficient to survive summary judgment on the issue of continuity through the defendants' alleged commission of the predicate acts and of the underlying fraudulent activity as an ongoing way of doing business. Accordingly, we do not need to concern ourselves with the applicability of the Barticheck factors to the specific facts of this case.

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[21] Although we decided *Barticheck* before *H.J. Inc.*, we have since noted that the six *Barticheck* factors are still relevant in determining whether a pattern exists. *See Hindes v. Castle*, 937 F.2d 868, 873 n.3 (3d Cir. 1991) ("The *Barticheck* factors, such as the number of acts, victims, and perpetrators and the character of the unlawful activity, may be relevant in some cases in assessing the threat of continuing criminal conduct by throwing light on whether the illegal activity was part of a legitimate business' regular way of conducting business, or whether the predicates were attributable to a 'long-term association that exists for criminal purposes.'") (citation omitted).

It remains clear, however, that "duration is the sine qua non of continuity." *Hindes*, 937 F.2d at 873. For this reason, the *Barticheck* factors are best viewed as analytical tools available to courts when the issue of continuity cannot be clearly determined under either a closed- or open-ended analysis. It should also be noted that the *H.J. Inc.* decision cites the Third Circuit's holding in Barticheck for two narrow propositions only: (1) that continuity is both a closed - and open-ended concept, 492 U.S. at 238, and (2) that "scheme" is not a self-defining term, 492 U.S. at 241 n.3. Nowhere in *H.J. Inc.* does the Supreme Court expressly adopt the Barticheck factors as being required elements in the "continuity" analysis.

We recognize that our ruling means that RICO, with its severe penalties, may be applicable to many "garden-variety" fraud cases, *see Marshall-Silver*, 894 F.2d at 597, particularly considering the judiciary's broad interpretation of the mail fraud statute. *See Kehr Packages*, 926 F.2d at 1413-14. We are bound, however, by the language of RICO itself and the Supreme Court's instruction that "RICO is to be read broadly." *Sedima*, 473 U.S. at 497. Indeed, the Supreme Court has consistently struck down efforts by the courts of appeals to narrow RICO's scope. *See NOW v. Scheidler*, 127 L. Ed. 2d 99, 114 S. Ct. 798, 806 (1994) (rejecting Seventh Circuit holding that RICO requires proof that either the racketeering enterprise or the predicate acts of racketeering were motivated by an economic purpose); *H.J. Inc.*, 492 U.S. at 250 (rejecting Eighth Circuit holding that RICO requires proof of multiple "schemes"); *Sedima*, 473 U.S. at 495 (rejecting Second Circuit holding that RICO requires proof of prior conviction on predicate act and that plaintiff must demonstrate specific "racketeering injury").

We share the Supreme Court's concern over the broad application of the civil RICO statute. We are nonetheless bound by the language of the statute and the Supreme Court's interpretation of it. Accordingly, it is for Congress to decide whether to narrow the scope of RICO; we are not in a position to do so by requiring that parties prove elements of a threat or of an injury, presented by predicate racketeering activity, beyond what is expressed in the language of the statute itself.[22]

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[22] The dissent relies upon our recent holding in *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250 (3d Cir. 1994) for the proposition that civil RICO should not be applicable in cases lacking a significant societal threat. But see footnote 17 in regard to our position that there is no requirement in civil RICO that the predicate acts pose a "societal threat." We find several significant differences, however, between *Jordan* and the dispute here.

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V.

Defendants have raised a number of alternative grounds for summary judgment claiming that insufficient causation and injury have been pleaded and that some of the defendants are not potentially liable under RICO. Because discovery has not been completed, we find that it would be premature to address these alternative grounds. Plaintiffs have sought to take additional depositions that could have substantial bearing upon these issues. Additionally, the district court did not rule on any of the alternative grounds, and, as a consequence, it would be inappropriate for us to consider them at this stage.[23]

VI.

For the foregoing reasons, we will reverse the district court's decision granting summary judgment against plaintiffs on their RICO claims, we will vacate the dismissal of plaintiffs'

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[22](...continued)

First, the duration and continuing nature of the underlying fraudulent activity alleged here is much greater. In addition, the district court in *Jordan* questioned the "relatedness" of the predicate acts, *see Jordan v. Berman*, 792 F. Supp. 380, 385-86 (E.D. Pa. 1992), and further held that plaintiffs had failed to establish that they had sustained any injury from the purported predicate acts. *Id.* at 388. Finally, and perhaps most importantly, the district court in *Jordan* found that there was no evidence presented that would lead a jury to believe that mail fraud had been committed. *Id.* at 387. As discussed above, we have come to a different conclusion in the present dispute.

[23] We note that on remand the court should consider whether the decision in *Reves v. Ernst & Young*, 122 L. Ed. 2d 525, 113 S. Ct. 1163 (1993) has any bearing on this case. In *Reves*, the Supreme Court held that only defendants who participate in the operation or management of an enterprise can be held liable for violating 18 U.S.C. § 1962(c).

supplemental state claim, and we will remand this case to the district court for further proceedings consistent with this opinion.[24]

BECKER, Circuit Judge, Concurring.

I.

I concur in the judgment, and I join those parts of Judge Roth's opinion that constitute an opinion of the in banc court, i.e., parts I, II, V, and VI. I do not join part IV of Judge Roth's opinion. I write separately, however, because I believe that the opinion has "stopped short," and not carried the logic of its argument to its ultimate conclusion. More specifically, while Judge Roth's opinion makes clear that the "*Barticheck* factors" cannot be the *sine qua non* of the continuity determination, and its opinion undoubtedly erodes *Barticheck's* precedential value, the court's logic -- as Judge Greenberg's dissent recognizes, *see* Dissenting Op. at page 7, especially lines 6-10 -- compels the conclusion that *Barticheck* should be abandoned. Yet Judge Roth leaves it breathing and thereby will, I fear, cause mischief by engendering confusion in the district courts, in addition to a round of further appeals.

I recognize that Judge Roth's opinion does not in terms rest on application of the six *Barticheck* factors. It is a fact, however, that these factors have been at the heart of this court's civil RICO jurisprudence for the past seven years, and most district court opinions struggling with the existence vel non of civil RICO continuity use *Barticheck* as their polestar. In my view, now that we are in banc on a civil RICO case, it is incumbent upon us to clarify the status of Barticheck, and the lead opinion's avoidance of the issue is not grounds for putting it off to another day. I

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[24] In view of our vacatur of the dismissal of plaintiffs' supplemental state claims, we do not need to rule on defendants' cross-appeal.

therefore write separately in order to set forth my understanding of the implications of this court's decision.

II.

Perhaps the most serious example of the uncertainty needlessly sown by the jurisprudential reticence of Judge Roth's opinion concerns *Barticheck* factor #6, the "character of the unlawful activity." In my view, the opinion can be read as leaving open the possibility that this factor, along with the other *Barticheck* factors, survives today's decision. *See* Lead Op. at page 40 ("The fact that we do not employ the *Barticheck* factors in our analysis here does not, however, mean that they might not be relevant in a different case in determining if continuity exists.") (emphasis supplied); *id.* at 41 n.21 ("The *Barticheck* factors . . . may be relevant in some cases in assessing the threat of continuing criminal conduct . . . .") (internal quotation marks omitted, emphases supplied). This is apparently the conclusion drawn by Judge Greenberg, whose dissent treats "character of the unlawful activity" as the most important of the factors. *See* Dissenting Op. at pages 12, 15. But Judge Roth's opinion does not explain how to distinguish this factor from "societal threat," which, she properly holds (if less emphatically than is warranted), cannot survive *Sedima* and *H.J., Inc.* *See* Lead Op. at page 34 n.17.

This reluctance to overrule *Barticheck* thus has the unfortunate potential for contributing to doctrinal confusion, for as Judge Greenberg argues in dissent, *see* Dissenting Op. at page 7, a given factor either is or is not relevant to the existence of a "pattern" of racketeering activity. The RICO statute does not have one provision for cases where relatedness and continuity (or their absence) are clear and another for "those cases where relatedness and continuity are in doubt." Lead Op. at page 40. Accordingly, I believe that we should inter *Barticheck* as a whole, and should forthrightly announce which, if any,

Barticheck factors remain relevant to the continuity analysis and which do not.

A.

As I read Judge Roth's opinion, it properly treats the length of time over which the predicate acts were committed (*Barticheck* factor #2), the number of unlawful acts (factor #1), and the routineness or customariness of the acts (which in my view is, as I explain below, the only permissible interpretation of factor #6, the character of the unlawful activity) as relevant for the continuity inquiry. Although Judge Roth does not discuss *Barticheck* factors #3-#5 (similarity of acts, number of victims, and number of perpetrators), I believe that its analysis shows that these factors are irrelevant to the continuity inquiry.

As Judge Roth notes, continuity is "centrally a temporal concept." Lead Op. at page 31 (quoting *H.J., Inc.*, 492 U.S. 229, 242). It simply "refers either to a closed period of repeated conduct [closed-ended continuity], or to past conduct that by its nature projects into the future with a threat of repetition [open-ended continuity]." *Id.* (quoting *H.J., Inc.*, 492 U.S. at 241) (alterations supplied here). Thus duration, whether established duration or likely duration, is central to the "continuity" aspect of a RICO "pattern." As a result, the length of time over which the predicate acts occurred (*Barticheck* factor #2) is of primary significance.

I agree with Judge Roth's view that something more is needed to make out a "pattern," and that two related predicate acts almost ten years apart are unlikely to suffice. *See* Lead Op. at page 37. But the number of predicate acts (*Barticheck* factor #1), on which her opinion properly relies in finding continuity here, provides all that is needed for closed-ended continuity. In conjunction with duration, the number of acts suffices to show frequency -- a concept that, as Judge Roth's opinion agrees, *see*

Lead Op. at 6, provides an adequate interpretation of "pattern" where completed, related acts are concerned.

As the Supreme Court has explained, the definition of a RICO "pattern" should accord with the plain meaning of that term. In particular,

> [a] "pattern" is an "arrangement or order of things or activity," and the mere fact that there are a number of predicates is no guarantee that they fall into any arrangement or order. It is not the number of predicates but the relationship that they bear to each other or to some external organizing principle that renders them "ordered" or "arranged."

H.J., Inc., 492 U.S. at 238, 109 S. Ct. at 2900 (citation omitted).

As I see it, the continuity prong of pattern analysis should be explicitly directed toward ruling out RICO liability premised on two or more predicate acts that are related but nonetheless "isolated" or "sporadic." *See H.J., Inc.*, 492 U.S. at 239, 109 S. Ct. at 2900 (discussing legislative history of the "pattern" requirement). Courts then would be in a better position to engage in reasonably meaningful discussions of whether -- in the concrete circumstances of the case -- continuing racketeering activity had been adequately alleged.

But the *Barticheck* factors fail to provide the needed guidance, and any attempt to use all six in continuity analysis, in my view, is destined for failure, in part because these factors were not originally intended to govern the continuity inquiry. Rather, they originated as an attempt to distill our case law on the RICO pattern requirement, simpliciter, not as an explication of separate relatedness and continuity requirements. *See Barticheck*, 832 F.2d at 38-39 ("Those cases . . . recognized that the existence of a RICO pattern . . . turns on . . . a combination of specific factors . . . .") (emphasis supplied). Some of the

Barticheck factors are relevant to this general notion of pattern.[25] Once "pattern" is analytically severed into "relatedness" and "continuity," however, there is no reason to insist that all six of the factors will logically bear on both continuity and relatedness. *Barticheck* did not do so. Rather, it discussed the various factors and concluded simply that the plaintiffs had adequately alleged a RICO pattern. *See id.* at 39.

What *Barticheck* did do, however, was recognize that continuity might be either open-ended or closed-ended, rejecting the defendants' argument that RICO reached only conduct that was potentially ongoing. *See id.* at 39-40. Furthermore -- and this accords with my view that the factors should be analyzed as they bear on screening out isolated or sporadic activity -- the *Barticheck* panel said that the "continuity" language in the legislative history cited in *Sedima*

> simply called for an inquiry into the extent of the racketeering activity. Although temporal open-endedness may be one measure of extent, it is not the only one. We decline to adopt a verbal formula for determining when unlawful activity is sufficiently extensive to be "continuous."

832 F.2d at 40. I would explicitly hold, therefore, that although the duration of the predicate acts does not without more show continuity, if the acts occurred (as shown by the number of acts) or establish a threat of occurring (as shown by also considering whether they are repetitive in nature) with some frequency, they

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[25] I do not mean to suggest that the number of perpetrators or victims, while irrelevant to continuity, is relevant to relatedness, for it is not. The identity or other defining characteristics of the victims and perpetrators, however, may help establish relatedness of predicate acts.

satisfy the continuity requirement, and, provided they are related, a pattern is shown.

"A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time." *H.J., Inc.*, 492 U.S. at 242, 109 S. Ct. at 2902. What constitutes a "substantial" period of time for these purposes (as long as in excess of "a few weeks or months," *see infra*) should vary with the number of acts in "the series" of predicates. As the number of acts in a given period of time increases, the predicates begin to look less sporadic and a pattern begins to emerge. The only (relative) absolute here should be that the predicates must stretch out at least for more than three or four months to establish closed-ended continuity in light of the Court's instruction that "predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy" the continuity requirement. *Id.* at 242, 109 S. Ct. at 2902.

For open-ended continuity, in contrast, we are looking for "conduct that by its nature projects into the future with a threat of repetition." Thus, while I agree with Judge Roth that the two types of continuity are cognate, I believe that to see whether open-ended continuity is established, what we should ask is simply whether the activity threatens to demonstrate close-ended continuity at some future time. This, I believe, is the point of the three examples of open-ended continuity in the *H.J., Inc.* opinion, including the scenario where the defendant's commission of predicate acts is "a regular way of conducting defendant's ongoing legitimate business." 492 U.S. at 242-43, 109 S. Ct. at 2902.

To return to *Barticheck* factor #6, in my view, threat of recurrence is also the only respect in which the "character" of the predicate acts is relevant to the continuity inquiry. As the Supreme Court and Judge Roth's opinion have explained, open-ended continuity merely refers to "past conduct that by its

nature projects into the future with a threat of repetition." Lead Op. at page 24 (quoting *H.J., Inc.*, 492 U.S. at 241, 109 S. Ct. at 2902) (emphasis supplied here). For example, if extortion is a defendant's regular way of conducting business, then the nature or character of the conduct in the sense of its routineness or literal open-endedness makes it likely to continue into the future. That is the sense in which the character of the activity is relevant to *continuity*.[26]

As Judge Roth's opinion correctly holds, "character of the unlawful activity" may not refer to some notion of "societal threat." Lead Op. at page 34 n.17. Because the opinion does not clarify the extremely limited sense in which "character" of the predicate acts is relevant to the continuity inquiry, the dissent unfortunately devotes great energy to arguing that the "character" of the predicate acts, meaning the species of act involved, weighs against a finding of continuity. *See* Dissenting Op. at pages 12-18. I believe that this effort is fundamentally at odds with the RICO statute and Supreme Court precedent interpreting it.

B.

The "societal threat" requirement can be traced back to this court's opinion in the first *Marshall-Silver* case, 835 F.2d 63 (3d

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[26] This interpretation of "character" of the unlawful activity as "repetitive character" also makes sense of the admonition in *Kehr Packages* to consider the underlying scheme in mail fraud cases. To the extent that the underlying scheme indicates a likelihood of a defendant's continuing to commit predicate acts, it may be relevant to open-ended continuity. (Of course, the underlying scheme also may supply an "organizing principle" that establishes relatedness. *See supra* at page (quoting *H.J., Inc.* 492 U.S. at 238, 109 S. Ct. at 2900).) In all cases, however, we are looking for a pattern (and thus continuity and relatedness) of the predicate acts of racketeering activity, *see H.J., Inc.*, 492 U.S. at 237-40, 109 S. Ct. at 2900-01; *id.* at 242, 109 S. Ct. at 2902.

Cir. 1987). There, we reasoned that "the target of RICO . . . is criminal activity that, because of its organization, duration, and objectives poses, or during its existence posed, *a threat of a series of injuries over a significant period of time*." *Id.* at 66-67 (emphases supplied). The panel dismissed the case in part because it involved "a single victim, a single injury, and a single short-lived scheme with only two active perpetrators," *id.* at 67, and thus did not pose the appropriate sort of threat. This was an eminently prudent attempt to make sense of the RICO pattern requirement. It appears to be an effort to get at the ongoing or potentially ongoing criminal activity that concerned Congress. It was essentially an extent requirement.

In the cases after *H.J., Inc.*, however, the concern over *extent* of injury was transmogrified to a focus on *societal* injury. Rather than worry about a "series of injuries," we have come to focus on a normative evaluation of the injuries alleged in a civil RICO case. Such focus is the basis for Judge Greenberg's dissent in this case, but with all due respect, given what Congress and the Supreme Court have said about the RICO statute, *see* Lead Op. at page 34 n.17, I believe that the focus is inappropriate in this context.

Congress in the RICO statute specified an extensive laundry list of serious and arguably less serious acts that all constitute racketeering activity, and so it strikes me as improper to maintain that the statute's "pattern" requirement builds in a normative evaluation of the seriousness of the predicate acts. The concern about federalizing and attaching drastic penalties to "garden variety fraud," *see* Dissenting Op. at pages 20-21, is a legitimate one, but one that must be addressed by Congress rather than the courts. And Congress has told us what sorts of acts to worry about. Our concern with the pattern requirement is simply to insure that RICO liability is not attached to "isolated" or "sporadic" predicate acts. That task requires no inquiry into the seriousness of the acts. The "threat" for which we are looking is

the threat of repeated prohibited conduct, not the threat of grievous harm.

With this in mind, I believe that this court should plainly state that the number of victims (factor #4) and number of perpetrators (factor #5) do not bear on the continuity inquiry. Certainly, neither the number of victims nor the number of perpetrators should affect the analysis of duration which, as the Judge Roth explains, the Supreme Court has rendered the centerpiece of the continuity jurisprudence. Indeed, these factors seem to inform the notion of societal threat, and hence are out of bounds.

Nor does the number of victims or perpetrators go to making out a pattern. For example, one office-tower bomb triggered during business hours could result in a tragically large number of victims, but just because the bombing happened during the day instead of at night when few people were there does not make it more likely that the bombing reflects non-isolated or non-sporadic activity. Similarly, three bombings by *several* conspirators trying to eliminate one target would not (if successful) reflect a greater threat of continuing racketeering activity than would three bombings by the Unabomber, because it is only the repetitive nature of the activity and not the number of victims or perpetrators that helps establish a threat of continuity.

The number of predicate *acts* could indicate an extent of activity that would bear on whether the activity is sporadic or frequent, and extent of the predicate activity is therefore relevant to continuity, as Judge Roth seems to recognize. *See* Lead Op. at page 38 ("[If] the predicate acts have been a regular way of conducting defendant's legitimate business over a long period in the past, the RICO pattern been satisfied."). But number of victims is not relevant, for, under the present congressional scheme, we are looking for continuity in order to show a pattern of racketeering acts, not harm from the acts. *See supra* page n.2.

C.

We have previously held that "similarity" (factor #3) does not bear on continuity, *see, e.g., Marshall-Silver*, 894 F.2d at 595 n.1, and Judge Roth has already made length of time (factor #2) and number of unlawful acts (factor #1) part of her core analysis, irrespective of *Barticheck*. In my view, the lead opinion leaves virtually nothing of *Barticheck* and I believe -- along with Judge Greenberg in dissent, *see* Dissenting Op. at page 7, especially lines 6-10 -- that we should say so. While I share Judge Roth's uneasiness as to where this leaves the law, I can only hope that its eloquent and clarion call will not be ignored by Congress.

Judges Stapleton and McKee join in this concurrence.

ALITO, Circuit Judge, concurring.

I concur in the judgment, and I join parts I, II, V, and VI of the opinion of the court. While the discussion of the "continuity" requirement in part IV of Judge Roth's opinion is a welcome step away from the approach taken in some of this court's prior decisions, I do not agree with certain portions of that discussion. I set out my understanding of the concept of "continuity" in *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1419-26 (3d Cir. 1991) (Alito, J., concurring and dissenting), and pursuant to that analysis, I think that closedended continuity was sufficiently established here to defeat summary judgment. My principal points of disagreement with the discussion in part IV of Judge Roth's opinion are as follows.

First, I do not agree with the intimation (Typescript at 34) that closed-ended continuity requires activity lasting years. *See Kehr Packages, Inc.*, 926 F.2d at 1421-22 (Alito, J., concurring and dissenting).

Second, I do not agree with the suggestion (Typescript at 36-37) that a plaintiff who establishes "closed-ended continuity" may also be required to show that the predicate acts were part of the defendant's regular way of conducting its business. I see no

support for this requirement in the language of the RICO statute or relevant Supreme Court decisions.

Third, I do not agree that, in a RICO case based on mail fraud predicates, we must "focus on the underlying fraudulent activity, rather that on the otherwise innocent mailings, in determining continuity." (Typescript at 38.) In my view, we must focus on the duration of the predicate violations. *See Kehr Packages, Inc.*, 926 F.2d at 1422-23 (Alito, J., concurring and dissenting).

Finally, I do not think that the *Barticheck* factors should be considered except to the extent that they have some logical bearing on "relatedness" or "continuity." *See Kehr Packages*, 926 F.2d at 1421 (Alito, J., concurring and dissenting).

GREENBERG, Circuit Judge, dissenting.

In its amended complaint, the Estate of Charles L. Tabas seeks to transform its state-law dispute with the defendants over the proper allocation of a partnership's profits into a federal RICO case simply by alleging that the defendants used the United States mail to communicate with it over a substantial period of time. While we have not considered directly whether a plaintiff can bring a RICO action in such circumstances, our precedents clearly forbid such alchemy. *See Hughes v. Consol-Pennsylvania Coal Co.*, 945 F.2d 594, 609-11 (3d Cir. 1991), *cert. denied*, 501 U.S. 1222, 112 S. Ct. 2300 (1992); *Hindes v. Castle*, 937 F.2d 868 (3d Cir. 1991); *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406 (3d Cir.), *cert. denied*, 501 U.S. 1222, 111 S. Ct. 2839, 115 L. Ed. 2d 1007 (1991); *Banks v. Wolk*, 918 F.2d 418 (3d Cir. 1990); *Marshall-Silver Constr. Co. v. Mendel*, 894 F.2d 593 (3d Cir. 1990); *Swistock v. Jones*, 884 F.2d 755 (3d Cir.

1989). Therefore, I would affirm the grant of summary judgment in favor of the defendants, and I respectfully dissent.[27]

I agree with the majority that the central issue in this appeal is whether the Estate has alleged that the defendants engaged in a "pattern of racketeering activity" as defined in 18 U.S.C. § 1961(5).[28] Majority typescript at 24. As noted by the majority, to establish a pattern of racketeering activity, a plaintiff "must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity." *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239, 109 S. Ct. 2893, 2900, 106 L. Ed. 2d 195 (1989) (emphasis in original). Thus, a plaintiff seeking to bring a RICO claim must allege, among other things, relatedness and continuity.

As the majority states, the predicate acts are 41 instances of alleged mail fraud. Of these, 39 were the mailing of $15,000 checks to the Estate, totalling $585,000, representing monthly distributions from Tabas Enterprises. The remaining two were the mailing of yearly tax forms to the Estate. Amended Complaint ¶ 49, App. at 43-46. According to the amended complaint, the checks were sent from December 22, 1987, to February 19, 1991, a period of over three years.[29] The Estate also alleges as

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[27] The Estate may have valid claims under state law, but I would hold that the district court did not abuse its discretion in dismissing these claims pursuant to 28 U.S.C. § 1367.

[28] I also agree with the majority that the 1987 settlement and the subsequent mutual release do not preclude the Estate from bringing this case. I mention this point because, as the majority notes, this issue was considered by the panel only and I was a member of the panel.

[29] The amended complaint recites that the last two checks were sent on January 18, 1990, and February 19, 1990. Amended Complaint at 34. However, these dates appear to be typographical

(continued...)

predicate acts that the defendants used the United States mail to send checks to members of Daniel Tabas's family for work not performed. Amended Complaint ¶ 51, App. at 46-47.[30] The majority, however, does not rely on these allegations as the Estate did not provide evidence that these checks were mailed, and the evidence on the motion for summary judgment established that a courier delivered them. I agree with this disposition and thus conclude that we are concerned only with the mailing of the $15,000 checks and the tax forms.

I would hold that these mailings are related.[31] *See Kehr Packages*, 926 F.2d at 1414 (noting that relatedness test almost always will be satisfied "in cases alleging at least two acts of mail fraud stemming from the same fraudulent transaction"). However, in my view these mailings do not satisfy the continuity requirement as defined by the Supreme Court's and our precedents. In *H.J., Inc.*, the Supreme Court stated that continuity "is both a closed-and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of

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[29](...continued)

errors because they are listed in an otherwise chronological sequence in which the next preceding date was December 14, 1990.

[30] In their brief, the defendants maintain that this allegation does not satisfy the pleading requirements of Fed. R. Civ. P. 9(b). Brief at 30 n.6; *see Banks v. Wolk*, 918 F.2d at 422 n.1 (noting that allegations of mail fraud must be plead with specificity required by Fed. R. Civ. P. 9(b)). I do not address this contention because even assuming that the pleading requirement is met, the allegations were refuted and, in any event, the Estate's allegations as a whole do not state a claim under RICO.

[31] While the majority does not hold explicitly that they are related, it implicitly reaches this conclusion.

repetition." 492 U.S. at 241, 109 S. Ct. at 2902 (citing *Barticheck v. Fidelity Union Bank/First Nat'l State*, 832 F.2d 36, 39 (3d Cir. 1987)). If a plaintiff does not allege that the predicate acts lasted over a "substantial period of time," then it must allege a threat of continued criminal activity. *Id.* at 242, 109 S. Ct. at 2902; *Marshall-Silver*, 894 F.2d at 596. Conversely, if a plaintiff alleges that the predicate acts lasted a substantial period of time, then it need not allege a threat of future criminal conduct. Therefore, a plaintiff alleging a closed-ended scheme has both a lesser burden in that it does not have to demonstrate a threat of future harm, and a greater burden in that it must establish that the predicate acts continued over a substantial period of time.

Although we do not have a bright-line rule establishing how long the predicate acts must last to constitute a "substantial period of time," I will assume that the period of over three years in this case would satisfy any such definition.[32] Yet, simply by clearing this duration hurdle the Estate does not establish continuity for we have stated clearly and repeatedly that duration is a necessary but not sufficient condition to proving continuity. In *Hindes v. Castle*, for example, we stated:

> The post-*H.J., Inc.* cases decided by this court which have focused on pattern all make clear that duration is the *sine qua non* of continuity. *While it is not in itself sufficient to establish a pattern*, a determination that must be made in light of all of the *Barticheck* factors, no pattern can be shown without the required duration.

937 F.2d at 873 (emphasis added). Likewise, in *Marshall-Silver* we recognized:

> If the Court in *H.J., Inc.* intended that the *duration* of the predicate acts or the threat arising therefrom should be

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[32] While I treat this case as a closed-ended case, obviously if I considered it as open-ended my result would be the same.

> determinative . . . we would not have expected the Court to eschew providing a specific standard in favor of a fact oriented, case-by-case development.

894 F.2d at 597 (emphasis in original) (dicta); *see also Kehr Packages*, 926 F.2d at 1412 (noting that "the length of time over which the criminal activity occurs or threatens to occur is an important factor," but not stating that it is dispositive). Accordingly, a more detailed analysis of the complaint is required.[33]

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[33] Our rule that duration is a necessary but not sufficient condition to establish continuity is consistent with the Supreme Court's statement in *H.J. Inc.*: "petitioners claim that the racketeering predicates occurred with some frequency over at least a 6-year period, which may be sufficient to satisfy the continuity requirement." 492 U.S. at 250, 109 S. Ct. at 2906 (emphasis added). By using the word "may," the Court implicitly rejected the notion that duration alone establishes continuity.

Precedents in other circuits could be read to suggest that duration alone can satisfy continuity. *See, e.g., Dana Corp. v. Blue Cross & Blue Shield Mutual*, 900 F.2d 882, 886-87 (6th Cir. 1990) (stating that in a single-scheme, single-victim case "the allegations of fraud occurring for a period of seventeen years, along with the specific mailings evidencing such a scheme, are sufficient to state a claim of a pattern of racketeering activity"); *Fleet Credit Corp. v. Sion*, 893 F.2d 441, 446-47 (1st Cir. 1990) (finding that 95 fraudulent mailings sent over a four and one-half year period are sufficient to establish continuity); *Walk v. Baltimore & Ohio & R.*, 890 F.2d 688, 690 (4th Cir. 1989) (reversing dismissal where complaint alleged 10-year scheme to defraud plaintiffs); *Jacobson v. Cooper*, 882 F.2d 717, 720 (2d Cir. 1989) (stating that continuity existed because predicate acts alleged occurred over "a matter of years"). However, it is not clear that in any of these cases, the courts of appeals faced a factual situation analogous to the one presented here, *i.e.*, a dispute over the profits of a partnership. This case most similar to this one

(continued...)

In *Barticheck v. Fidelity Union Bank/First Nat'l State*, 832 F.2d 36, we set forth six factors that a court should address in considering whether the plaintiff has alleged a pattern of racketeering: (1) the number of unlawful acts; (2) the length of time over which the acts were committed (duration); (3) the similarity of the acts; (4) the number of the victims; (5) the number of perpetrators; and (6) the character of the unlawful activity. *Id.* at 39. The majority nevertheless concludes that having "found a pattern of racketeering activity in both the duration of and the on-going threat implicit in defendants' regular way of doing business [it] will not go on to analyze this case under the six *Barticheck* factors." Majority typescript at 40. The majority then indicates that its decision not to employ the *Barticheck* factors does not mean that they are irrelevant in determining where there is continuity, as a court may consider the factors if relatedness and continuity are in doubt.

I reject the majority's approach. To start with, continuity is in doubt here. But quite aside from that consideration it seems to me that the majority's approach inevitably leads to analytical looseness in determining whether there has been a pattern of racketeering activity. While I do not doubt that in practice the *Barticheck* factors cannot be applied with mathematical precision, at least the factors are guidelines in determining whether the plaintiff has demonstrated continuity and relatedness.

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[33](...continued)

is *Jacobson*. In *Jacobson*, the plaintiff alleged that the two defendants, one of which was his son, attempted to defraud him out of real estate holdings that he owned. While the nature of the dispute is somewhat similar, the alleged predicate acts went beyond mail fraud and included extortion, larceny, offering false instruments for filing, and usury. 882 F.2d at 719. Thus, the character of the unlawful activity in Jacobson is vastly different than that alleged here. In any event, we are not bound by *Jacobson*.

The majority opinion would be more justifiable if it were to say that after *H.J., Inc.*, the earlier explicated *Bartichek* [sic] factors are no longer relevant in any continuity analysis. While I would disagree with that holding, such a result would have some analytical consistency. But by saying the *Bartichek* [sic] factors are relevant in some cases but not in others, *see* majority typescript at 40-41 & n.21, the majority winds up saying that the *Bartichek* [sic] factors -- which are designed to answer the broader question of whether particular facts fairly can be characterized as a RICO case -- may shed light on whether a three-month long scheme constitutes a pattern of racketeering activity but not on whether a three-year long scheme constitutes such a pattern. It seems to me self-evident that there are three-month long schemes that clearly fall within RICO's purview and three-year schemes that clearly do not. Thus, if the *Bartichek* [sic] factors are relevant at all, they are relevant in shedding light on all cases. The majority's approach to the complex statute does injustice to the Supreme Court's admonitions to courts to take a "flexible approach" when interpreting the "continuity" prong of the statute and to develop the concepts behind "pattern of racketeering activity" on a case by case basis. *See H.J. Inc.*, 492 U.S. at 238, 243, 109 S. Ct. at 2900, 2902-03. *See also Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 500, 105 S. Ct. 3275, 3287, 87 L. Ed. 2d 346 (1985) (Congress "and the courts" should "develop a meaningful concept of 'pattern.'") (emphasis added). Of course, as I have indicated, we decided *Barticheck* before the Supreme Court's decision in *H.J. Inc.* Nevertheless, we have noted in post-*H.J. Inc.* cases that the *Barticheck* factors are still relevant and must be considered "'as they bear upon the separate questions of continuity and relatedness.'" *Hindes*, 937 F.2d at 873 (quoting *Banks*, 918 F.2d at 423); *accord Midwest Grinding Co., Inc. v. Spitz*, 976 F.2d 1016, 1023-25 (7th Cir. 1992) (noting that factors set forth in *Morgan v. Bank of Waukegan*, 804 F.2d 970, 975 (7th Cir. 1986), which are similar to *Barticheck* factors, apply even after *H.J. Inc.*). In

Marshall-Silver, we recognized that all of the *Barticheck* factors except the third, the similarity of criminal acts, are relevant to the question of continuity. 894 F.2d at 595 n.1; *see also* Hindes, 937 F.2d at 873 (reaffirming this view). Thus, the question of continuity is an "'inquiry into the extent of the [defendant's] racketeering activity,'" *Marshall-Silver*, 894 F.2d at 595 (quoting *Barticheck*, 822 F.2d at 40), and requires an examination of the five *Barticheck* factors relevant to continuity. Moreover, in applying these factors, we must take a "natural and common sense approach" to continuity. *H.J. Inc.*, 492 U.S. at 237, 109 S. Ct. at 2899. In view of these precedents in which so many of the judges of this court have joined, I am perplexed at the majority's subordination of *Barticheck*.

Inasmuch as I would apply *Barticheck* in this case I will now make an analysis of the factors it set forth. The first factor, the number of unlawful acts, might appear to weigh in favor of continuity as the Estate alleged that the defendants engaged in over 40 predicate acts. However, as we stated in *Kehr Packages*, "the continuity question should not be affected by the fact that a particular fraudulent scheme involved numerous otherwise 'innocent' mailings, rather than only a few." 926 F.2d at 1414. Rather, what needs to be considered is the underlying scheme: "Although the mailing is the actual criminal act, the instances of deceit constituting the underlying fraudulent scheme are more relevant to the continuity analysis." *Id.*; *see also Midwest Grinding Co.*, 976 F.2d at 1024 ("Although the sheer number of predicate acts might appear at first glance to prove continuity, when it comes to a pattern premised on acts of mail or wire fraud, the volume of mailings is not dispositive.").

In this case, the alleged underlying scheme was an attempt to defraud the Estate out of its rightful share of the partnership income. Thus, the allegations of fraud relate to a discrete dispute, rather than to numerous distinct attempts to defraud. To paraphrase *Kehr Packages*, "it should not be relevant . . . that

[the defendants] sent [checks] on a monthly basis, rather than quarterly or yearly." 926 F.2d at 1414. Thus, "the sizable number of mailings does not show that the defendants operated a long-term criminal operation." *Midwest Grinding Co.*, 976 F.2d at 1025. Accordingly, this factor weighs against a finding of continuity.

The second factor is duration. As I noted above, the alleged fraudulent activity lasted for at least three years. However, the significance of the length of the alleged scheme is diminished by the nature of the scheme itself. In this regard, I reiterate that the defendants repeated the same allegedly fraudulent act over three years. Thus, this is not a case in which each mailing constituted a new fraudulent act. *See Kehr Packages*, 926 F.2d at 1415 (distinguishing *Fleet Credit Corp. v. Sion*, 893 F.2d 441 (lst Cir. 1990), because in Fleet Credit "each mailing constituted a new fraudulent act"). As we noted in *Marshall-Silver*:

> Where such a fraudulent scheme inflicts or threatens only a single injury, we continue to doubt that Congress intended to make the availability of treble damages and augmented criminal sanctions dependent solely on whether the fraudulent scheme is well enough conceived to enjoy prompt success or requires pursuit for an extended period of time.

894 F.2d at 597. Therefore, while the second factor, duration, does weigh in favor of continuity, it is not a heavy weight on the scale. I will not discuss the third factor, the similarity of the alleged criminal acts, as that factor concerns relatedness, which I have found in this case.

The fourth factor, number of victims, weighs against a finding of continuity for, as the district court correctly indicated, this is a single-victim case. The Estate disputes this conclusion, contending that all six of the beneficiaries of the Estate are victims, including a charitable foundation that ultimately benefits hundreds, if not thousands, of people. Brief at 27 n.18. Yet, this

argument is supported neither by the case law nor the amended complaint itself. In *Kehr Packages*, we addressed an analogous situation and found that the only victim of the defendants' alleged criminal activity was the company and not its shareholders or its guarantors. We reached this conclusion because "Kehr's individual shareholders and guarantors, and the holders of pledged collateral, were affected only indirectly." 926 F.2d at 1418-19; *see also Hughes*, 945 F.2d at 611 (noting that alleged scheme affected single victim, "albeit a class of victims," in rejecting RICO claim). Similarly, here the scheme affected the beneficiaries of the Estate only indirectly.

Additionally, throughout its amended complaint, the Estate maintains that the fraudulent conduct deprived it, the Estate, of its rightful share of the income. Indeed, according to the 1964 Partnership Agreement, the deceased party's share of the income is payable to his estate, not to his heirs. App. at 155. While it is true that the presence of only one victim, like the existence of only one scheme, does not necessarily preclude the finding of a RICO pattern, this fact clearly weighs against the finding of continuity. *See United States Textiles, Inc. v. Anheuser-Busch Cos.*, 911 F.2d 1261, 1268 (7th Cir. 1990). Indeed, when there is only one victim and that victim is engaged in a business relationship with the defendant, the dispute between the parties may be nothing more than a civil controversy.

The fifth factor, the number of perpetrators, does appear to weigh in the Estate's favor. The district court stated that there was only one perpetrator, "Daniel Tabas or individuals under his control." Opin. at 8-9. But this conclusion is inherently contradictory for even if the other perpetrators are under Daniel's control, they still existed. In fact, the district court's description could be used to describe an organized crime family, yet clearly Congress meant RICO to cover organized crime. Nonetheless, this error is not significant, for even if the number were as large as the Estate argues, the fact that more than one person was

involved in a scheme to defraud that lasted a substantial period of time cannot without more establish continuity. Indeed, in some ways this is the least important factor. *Cf. Wade v. Hopper*, 993 F.2d 1246, 1251 (7th Cir.) (per curiam) (listing factors relevant for continuity determination similar to those listed in *Barticheck* but not including number of perpetrators), *cert. denied*, 126 L. Ed. 2d 151, 114 S. Ct. 193 (1993); *Morgan v. Bank of Waukegan*, 804 F.2d at 975 (listing same factors in pre-*H.J. Inc.* case). Thus, this factor does not place a heavy weight on the continuity side of the scale.

The final factor, the character of the unlawful activity, is perhaps most important in assuring that RICO is applied in a manner consistent with congressional intent. Congress aimed to prevent long-term criminal activity, but not to federalize every garden-variety claim of fraud. "The concept of 'continuity' plays an important constraining role in the operation of the RICO statute" by requiring a court to examine not only the "period of time over which the predicate acts occurred or . . . during which any threatened criminal activity would be likely to last," but also the character of the predicate acts and the extent of the injury generated by the acts. *Marshall-Silver*, 894 F.2d at 596-97. In this case the character of the alleged acts of mail fraud and the confined extent of the injury weigh heavily against the Estate. "Repeated mailings in furtherance of a single scheme to inflict one fraudulent injury may be no indication of the underlying fraud's continuity." *Shields Enters., Inc. v. First Chicago Corp.*, 975 F.2d 1290, 1295 (7th Cir. 1992).

As I already have noted, this case evolves from an ongoing dispute regarding the appropriate split of a partnership's profits. The allegations of fraud do not pertain to how Tabas Enterprises conducts its business, but only to its internal functioning. Moreover, unlike other conduct which can constitute racketeering activity, such as extortion, robbery, or murder, there is nothing inherently criminal in mailing a letter containing a check or a tax

form. *See* 18 U.S.C. § 1961(1). Indeed, the vast majority of mailings undoubtedly are lawful. Thus, in this case the mailings could be regarded as racketeering activity only by reference to matters beyond the letters and their contents.

The unreasonableness of regarding the mailing of the thirty-nine $15,000 checks as RICO predicate acts in this case is demonstrated by considering what would have happened if the defendants had delivered the checks rather than mailed them. In that case, they could not have committed mail fraud and the Estate could not have pleaded a RICO case, as there would have been no predicate acts on which to base the complaint. Rather than seeking threefold damages under RICO, 18 U.S.C. § 1964(c), the Estate would have been limited to a state law claim -- even though at bottom the unlawful activity in both that hypothetical case and this case involves conduct of precisely the same character. I thus ask the following question: is it conceivable that Congress intended that RICO could be applied to a defendant who mails substantial payments to the plaintiff, but not to the same defendant if it delivers the payments?[34] The question answers itself. Thus, the fact that this case involves mail fraud rather than some other type of fraud is entirely fortuitous, and that fortuity should not result in a windfall to the plaintiffs. But by ignoring the *Bartichek* [sic] factors, and therefore failing to inquire into the character of the unlawful activity, the majority endorses just that counterintuitive result.

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[34] While the majority answers that Congress did intend to distinguish between mailings and hand deliveries as the former but not the latter could be mail fraud, this answer misses my point. My point is that in considering the character of the unlawful acts in accordance with the sixth *Bartichek* factor, the use of the mails was purely fortuitous in this particular case and it was the alleged fraud and not how the checks were delivered which injured the Estate.

I recognize that the complaint is rife with contentions that the defendants' activity defrauded the Estate out of its fair share of the partnership's income. Yet the Estate does not allege that the defendants' conduct has ramifications outside the confines of the immediate dispute regarding the division of the partnership's profits. Thus, the broader threat is minimal at most. *See Meade v. Meade*, 1991 U.S. Dist. LEXIS 16654, 1991 WL 243539, *5 (E.D. Pa. Nov. 18, 1991) ("This is a dispute between a small number of parties, and neither directly affects nor has wider implications for a large number of people. Actual and threatened societal injury is little, if any. Finally, each alleged act of mail and wire fraud forms part of one, extended scheme, reinforcing the essentially isolated nature of the alleged racketeering activity."), *reconsideration denied*, 1992 U.S. Dist. LEXIS 300, 1992 WL 6929 (E.D. Pa. 1992), *aff'd*, 998 F.2d 1004 (3d Cir. 1993) (table); *Rumbaugh v. Chandler*, 1991 U.S. Dist. LEXIS 11948, *11, 1991 WL 169046, *4 (E.D. Pa. Aug. 27, 1991) (App. at 1893-900) ("This action does not concern an extensive criminal enterprise whose long-standing, repeated conduct has caused and will continue to cause a severe injury to the community. Rather, it is a private dispute between two ex-partners that has continued over twelve years in various forms.").

I make one final but critical point with respect to the character of the unlawful activity in this case. I focus on this point because I regard the character of the activity as the most significant *Barticheck* factor in this case. As the majority points out, 39 of the predicate acts consist of the mailing of $15,000 checks to the Estate and the other two concern mailing tax forms. Reliance on such predicate acts is problematic because the Estate is pleading in essence that the defendants committed "mail fraud" by sending it money. I can conceive of cases in which a defendant's act of sending money may constitute fraud; perhaps, even, the defendants' activities (as alleged in this case)

theoretically could be prosecuted under the mail fraud statute,[35] although it must be remembered that "not every use of the mails . . . in connection with a scheme is punishable" as mail fraud. *United States v. Frey*, 42 F.3d 795, 1994 U.S. App. LEXIS 34772, *3 (3d Cir. 1994). But three undisputed facts belie the conclusion that this is therefore a RICO case. First, between March 1983 and September 1986, "Tabas Enterprises paid for various personal expenses incurred by Harriette [as well as] Daniel." Majority typescript at 4. Second, "prior to Charles's death . . . the brothers appeared to have an arrangement under which Tabas Enterprises paid for many personal and business expenses." Majority typescript at 4 n.2 (emphasis added). Finally, as the majority indicates, plaintiffs acknowledge that as of the time of the state court lawsuit, "they believed Daniel was taking more than he was entitled to under the partnership agreement . . . They contend [only] that they did not know the extent to which they were being short-changed . . . ." Majority typescript at 5 n.3 (emphasis added).

These facts make difficult to accept the majority's conclusion that the "mailings [were] 'designed to lull [the Estate] into a false sense of security, postpone [its] ultimate complaint to the authorities, and therefore make the apprehension of the defendants less likely than if no mailings had taken place.'" Majority typescript at 35 n.18 (citation omitted). In any event, no matter how the Estate characterizes this case, and even if there were some fraudulent acts, this suit is first and last a dispute about how the partnership income should have been distributed.

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[35] *See Schmuck v. United States*, 489 U.S. 705, 714-15, 109 S. Ct. 1443, 1450, 103 L. Ed. 2d 734 (1989) ("To the extent that Schmuck would draw from these previous cases a general rule that routine mailings that are innocent in themselves cannot supply the mailing element of the mail fraud offense, he misapprehends this Court's precedents.").

Seen in this context, the mailing of the checks was so benign an act that it is a thin foundation on which to build the continuity element. At bottom, regardless of the pejorative words which the Estate uses to characterize the defendants' conduct, this case involves a commercial dispute over a discrete issue, the amount due to the Estate in its monthly draws. Such a dispute is simply not a RICO controversy.[36]

I recognize that the majority has listed numerous questionable expenses charged against Tabas Enterprises and I further acknowledge that the defendants may have state law liability for some of these expenses. But it is important in considering this case to keep in mind that the incurring of these expenses is not the predicate criminal conduct charged in this case. Rather, the predicate acts to establish RICO jurisdiction are the use of the mails to disburse checks and to distribute forms. Overall, therefore, after consideration of the character of the unlawful activity, together with the other relevant *Barticheck* factors, both qualitatively and quantitatively, I conclude that the Estate has failed to establish a genuine issue of material fact over continuity and that this case is yet another attempt by a plaintiff "to fit a square peg in a round hole by squeezing garden-variety business disputes into civil RICO actions." *Midwest Grounding Co.*, 976 F.2d at 1025.

In reaching my conclusions, I have taken particular note of our opinion in *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250 (3d Cir. 1994), which affirmed the district court's judgment granting certain of the defendants "summary judgment

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[36] Keeping in mind that this case is really about who gets to use the partnership income for what purpose, consider what would have happened if the defendants had paid nothing to the Estate over the three-year period in which they actually paid $585,000. The Estate would have gotten nothing and there would not be a RICO case.

on the RICO claim against them for failure to show relatedness and continuity . . . essentially for the reasons given by the district court." *Id.* at 1254. The district court opinion is reported as *Jordan v. Berman*, 792 F. Supp. 380 (E.D. Pa. 1992). *Jordan* is a complex case involving a controversy between tenants and a landlord, the details of which I need not discuss. Germane here is the district court's conclusion that the plaintiffs had not adduced "evidence from which one could reasonably find a pattern of racketeering activity under prevailing case law." *Id.* at 388. The district court explained the basis for its decision as follows:

> Few relationships in our society seem to engender more conflict than that of landlord and tenant. The aggressive landlord and the disgruntled tenant have almost become stereotypical. The *instant case involves a typical landlord-tenant dispute about the construction of a lease and what sums or services the respective parties are entitled to*. Permitting trash to accumulate for day, disrupting utility service for half a day and vigorously pursuing a plausible contract interpretation are generally not the kind of things from which RICO cases are made. The actions of defendants and their agents, however characterized, do not pose the type of significant societal threat that RICO was designed to deter or penalize.

Id. (emphasis added). By affirming "essentially for the reasons given by the district court," we approved the foregoing statement, even though the case involved the use of the mails and thus, in theory, could have been a RICO case.

If we substituted the relationship between partners for the landlord-tenant relationship, the underscored language in the above quotation would describe this case. Certainly the partnership relationship, like the landlord-tenant relationship, is

a frequent source of disputes. The dispute in this case, to quote from and to paraphrase *Jordan v. Berman*:

> involves a typical [partnership] dispute about the construction of a [partnership agreement] and what sums . . . the respective parties are entitled to. . . . The actions of defendants and their agents, however characterized, do not pose the type of significant societal threat that RICO was designed to deter or penalize.

Thus, this case is no more a RICO case than was *Jordan*.

In coming to my conclusions I also have found it useful to consider *United States v. Pelullo*, 964 F.2d 193 (3d Cir. 1992), a case which the majority cites and on which the Estate relies. *Pelullo* is a post-*H.J. Inc.* case in which we found that a RICO violation could be proved based on a closed-ended scheme that lasted 19 months. In *Pelullo*, the defendant was a chief executive officer of The Royale Group, Ltd., a publicly held corporation which through subsidiaries acquired six hotels in Miami Beach. In June 1984, the hotels obtained a $13.5 million loan from a subsidiary of American Savings and Loan Association. Under the terms of the loan, $6.2 million was to be used for renovation, with American retaining this portion and disbursing the funds as renovation costs were incurred. To obtain a disbursement, Royale was required to submit draw requests which set forth a certified itemization of the costs.

The indictment charged *Pelullo* with three fraudulent schemes: (1) defrauding American, Royale, and Royale's shareholders by submitting false documents in connection with certain draw requests; (2) defrauding Royale of $114,000 by diverting cash from one of its subsidiaries to repay a debt Pelullo owed; and (3) defrauding Royale of approximately $500,000 by diverting money for uses other than for the purposes of the loans. Accordingly, the alleged number of schemes in *Pelullo* was larger than the one scheme alleged here. And while the number of

victims in *Pelullo* could be characterized as small, the nature of the unlawful activity had a different ring to it, because in *Pelullo* the alleged perpetrator was an officer in a public company and the main victims (American and Royale) were public entities. Moreover, the alleged fraud was not confined to Royale's internal operations, but took place in the context of its normal external business operations. Thus, even though the Estate relies on *Pelullo*, that case involved much more than a dispute between partners and does not support the Estate's position. Pelullo nevertheless is instructive to illustrate the contrast between a real RICO case and the Tabas's dispute.

While I do not suggest that a plaintiff alleging a single fraudulent scheme injuring a single victim in the context of a private dispute never can maintain a RICO claim, it would be unusual for such a case to be covered by RICO, especially where the alleged predicate acts are mail fraud. In reaching this conclusion, I am cognizant that "RICO's pattern requirement does not require the existence of more than one 'scheme,'" *Marshall-Silver*, 894 F.2d at 596, and that the Supreme Court has declared that the RICO statute should be read broadly "to reach both 'legitimate' and 'illegitimate' enterprises," *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499, 105 S. Ct. 3275, 3286, 87 L. Ed. 2d 346 (1985). Furthermore, I recognize that the Court has noted that civil RICO appears to be "evolving into something quite different from the original conception of its enactors," and that this problem is for Congress, not the courts, to correct. *Id.* at 499-500, 105 S. Ct. at 3287. *See also NOW v. Scheidler*, 127 L. Ed. 2d 99, 114 S. Ct. 798, 806 (1994).

Yet our precedents clearly establish that Congress did not intend RICO to cover every garden-variety fraud. *See Marshall-Silver*, 894 F.2d at 597; accord *Midwest Grinding Co.*, 976 F.2d at 1025 ("It is equally evident that RICO has not federalized every state common-law cause of action available to remedy business deals gone sour."). Rather, the Supreme Court,

"by refocusing the pattern requirement on the sort of long-term criminal activity that carries some quantum of threat to society," *Midwest Grinding Co.*, 976 F.2d at 1025, has attempted "to prevent RICO from becoming a surrogate for garden-variety fraud actions properly brought under state law," id, at 1022; *See also Marshall-Silver*, 894 F.2d at 596-97 (noting that continuity plays an important role in constraining operation of RICO statute to only those activities which threaten societal injury). Moreover, the Supreme Court has confined the scope of RICO by limiting the persons who can be liable under 18 U.S.C. § 1962(c). *See Reves v. Ernst & Young*, 122 L. Ed. 2d 525, 113 S. Ct. 1163 (1993).

In my view, the majority's opinion inexorably will result in federalizing numerous internal business disputes in a way that Congress never could have intended. The opinion as applied in this circuit will lead attorneys to repackage as RICO actions ordinary commercial controversies in which the parties have communicated by mail or wire. Indeed, it seems obvious that the principles of this case could be applied to routine commercial disputes in many situations in which the parties have been in an ongoing relationship, *e.g.*, partnerships, tenancies, employer-employee, service contracts, supply contracts, equipment rentals, brokerage accounts, and others as well. A party in such a relationship, dissatisfied with the other party's performance, will be able to establish RICO jurisdiction by alleging fraud and pointing to the other party's numerous mailings in furtherance of its understanding of the terms of the relationship. For the foregoing reasons, I dissent. Chief Judge

Sloviter,[37] and Judges Hutchinson, Scirica, Cowen, and Nygaard[38] join in this dissent.

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[37] Judge Sloviter joins with the following statement. Although I do not agree with every detail of Judge Greenberg's dissent, I join it because it comes closest to expressing my frustration that the analytic litany that the courts must now conduct in civil RICO cases leads to a result, the federalization of garden variety fraud, that is directly contrary to Congress's expressed intent.

[38] Judge Nygaard joins in the dissent, believing that the district court properly granted summary judgment in favor of the defendants. He bases his conclusion that summary judgment was proper, however, upon plaintiffs' failure to show facts giving rise to mail fraud under RICO rather than upon a failure to establish a pattern of racketeering activity. Under Judge Nygaard's analysis, the mailings here were, as in *United States v. Maze*, 414 U.S. 395, 94 S. Ct. 645, 38 L. Ed. 2d 603 (1974), merely post-fraud means of transmitting matter from one place to another. Judge Nygaard believes that inasmuch as the fraud "had reached fruition," at the time of the mailing, it cannot be said that the mailings in question were for the purpose of executing the scheme, as required by the statute. *Kann v. United States*, 323 U.S. 88, 65 S. Ct. 148, 89 L. Ed. 88 (1944). Hence, it was not "an essential step" in the success of the fraud. *Schmuck v. United States*, 489 U.S. 705, 714, 109 S. Ct. 1443, 1450, 103 L. Ed. 2d 734 (1989).

HARRIETTE S. TABAS; RICHARD S. TABAS; NANCY C. TABAS; GERALD LEVINSON, as Executors of the Estate of CHARLES L. TABAS, Appellants in No. 92-1495

v.

DANIEL M. TABAS; JOSEPH P. CAMPBELL; JAMES J. McSWIGGAN; LEE A. TABAS; ROBERT TABAS; SUSAN TABAS TEPPER; LINDA TABAS STEMPEL; JOANNE TABAS WURZAK; CAROL TABAS STOFMAN; HOWARD WURZAK, Appellants in No. 92-1529

Nos. 92-1495, 92-1529

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

May 25, 1994, Decided

PRIOR HISTORY: Original Opinion of May 2, 1994, Previously Reported at: 1994 U.S. App. LEXIS 9355.

JUDGES: Present. SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, and LEWIS, Circuit Judges.

OPINION: ORDER

A majority of the active judges having voted for rehearing in banc in the above appeal, it is ORDERED that the Clerk of this Court vacate the panel's opinion and judgment filed May 2, 1994, and list the above case for rehearing in banc at the convenience of the court.

By the Court,

Dolores K. Sloviter Chief Judge

HARRIETTE S. TABAS; RICHARD S. TABAS; NANCY C. TABAS; GERALD LEVINSON, As Executors of the Estate of CHARLES L. TABAS, Appellants, No. 92-1495

v.

DANIEL M. TABAS; JOSEPH P. CAMPBELL; JAMES J. MCSWIGGAN; LEE A. TABAS; ROBERT TABAS; SUSAN TABAS TEPPER; LINDA TABAS STEMPEL; JOANNE TABAS WURZAK; CAROL TABAS STOFMAN; HOWARD WURZAK, Appellants, No. 92-1529

Nos. 92-1495, 92-1529

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

January 26, 1993, Argued

May 2, 1994, Filed

SUBSEQUENT HISTORY: As Corrected May 4, 1994. Vacated by the Court May 25, 1994; Rehearing Granted May 25, 1994, Reported at: 1994 U.S. App. LEXIS 11956.

PRIOR HISTORY: On Appeal From the United States District Court For the Eastern District of Pennsylvania. (D.C. Civil Action No. 91-01355).

COUNSEL: Richard A. Sprague, Esquire (Argued), Howard K. Goldstein, Esquire, Daniel L. Lemisch, Esquire, Denise Pallante, Esquire, Sprague & Sprague, 135 South 19th Street, Wellington Building, Suite 400, Philadelphia, PA 19103, Attorneys for Appellants. Harold E. Kohn, Esquire (Argued), Robert J. LaRocca, Esquire, Joanne Zack, Esquire, Deborah A. Sottosanti, Esquire, Kohn, Nast & Graf, P.C., 1101 Market Street, 24th Floor, Philadelphia, PA 19107, Attorneys for Appellees.

JUDGES: Before: GREENBERG, ROTH and LEWIS, Circuit Judges.

OPINION OF THE COURT

ROTH, Circuit Judge:

This appeal requires us to answer a familiar question -- whether defendants' acts constituted a "pattern of racketeering activity" under the Racketeer Influenced and Corrupt Organizations ("RICO") chapter of the Organized Crime Control Act of 1970, Pub. L. 91-452, Title IX, 84 Stat. 941, as amended, 18 U.S.C. §§ 1961-1968.

The questioned acts have caused a bitter family dispute which began shortly after the death of Charles Tabas in 1983. Charles and Daniel Tabas were brothers. They were also co-managers and equal partners in Tabas Enterprises.

Plaintiff-appellants allege that Daniel and the other defendants committed numerous acts of mail fraud as part of a scheme to defraud Charles' estate of a substantial sum of money. Plaintiffs assert that these allegedly fraudulent acts constitute a pattern of racketeering activity under the civil RICO statute.

The plaintiffs are four of the executors of the Estate of Charles Tabas ("the Estate"): Charles's widow, Harriette Tabas; two of their children, Richard Tabas and Nancy Tabas; and Gerald Levinson, one of Charles' business associates.[1] In addition to Daniel, who is President and Chief Executive Officer of Tabas Enterprises, the named defendants include Joseph Campbell, the Executive Vice President of Tabas Enterprises; James McSwiggan, the Comptroller of Tabas Enterprises; Daniel's children; and one of Daniel's sons-in-law.

Plaintiffs filed this action pursuant to civil RICO and state law, seeking damages and an award against defendants of attorney's fees and costs. The district court found that plaintiffs

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[1] There are six heirs to the Estate, including the Charles L. Tabas Foundation.

failed to allege a course of conduct sufficient to establish a RICO "pattern" in that plaintiffs failed to satisfy RICO's "continuity" requirement. Accordingly, the district court granted defendants' summary judgment motion on the RICO claims and dismissed the state claims without prejudice. We conclude that plaintiffs did satisfy RICO's continuity requirement. Therefore, we will reverse the grant of summary judgment, and we will remand this case to the district court for further proceedings consistent with this opinion.

I.

The brothers, Charles and Daniel Tabas, formed the partnership, Tabas Enterprises, to conduct real estate and other business ventures. A partnership agreement, entered into by the brothers in 1964 to govern their joint property holdings, required that, in the event of the death of either partner, the surviving partner would distribute partnership income equally to himself and to the estate of the deceased partner. The 1964 agreement provided that as long as the two brothers and/or their respective estates owned property jointly:

> the distribution of income, in whatever form it may take, arising from property jointly owned, shall be equal. In the event of the death of either party hereto his share of distributable income shall be paid to his estate. The equal distribution shall apply regardless of what personal services either may render.

Appendix ("App") at 62 (Partnership Agreement ¶ 3).

Plaintiffs assert, based on the partnership agreement, that, whenever Daniel withdrew any income from the partnership for himself, an equal amount of income should have been paid to the Estate. This assertion, along with the alleged fiduciary

relationship underlying it, is based in part on a section of the partnership agreement which provides that:

> It is the intent of the parties that the survivor of them shall be free to exercise his judgment for the joint benefit of ownership without interference or hinderance from the personal representatives of the deceased party, provided always, that the responsibility and obligation of the survivor to the estate of the deceased shall be that required of a fiduciary.

App. at 63 (Partnership Agreement ¶ 4(b)).

Soon after Charles's death, a financial advisor to Daniel and Tabas Enterprises, John Van Der Wal, was asked by Daniel to recommend a reasonable financial arrangement between Daniel and Charles's widow, Harriette. In a letter to Harriette, the advisor recommended that Daniel receive a $180,000 annual management fee from Tabas Enterprises prior to profit sharing by the partners and that Harriette and Daniel each receive a monthly draw check from Tabas Enterprises in the amount of $10,000.[2] This recommendation was intended to serve as an "interim financial arrangement" until the estate was settled. It was apparent from Van Der Wal's letter that the monthly payments would be made pursuant to the partnership agreement. The letter stated: "As you know, one-half of the amount you draw really belongs to the trusts for the children and the charitable remainder trust. Therefore, at the time the estate makes its distributions, these trusts should be reimbursed for their interest in the profit share drawn." App. at 165.

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[2] Prior to Charles' death, each brother received a monthly disbursement of $10,000 by Tabas Enterprises. In addition, the brothers appeared to have an arrangement by which Tabas Enterprises paid for many personal and business expenses.

Beginning in March 1983, shortly after Van Der Wal's letter, monthly distribution checks were drawn on a Tabas Enterprises' account and sent to Harriette through the United States mails pursuant to the arrangement stated in the letter. Daniel was also provided with a $10,000 monthly draw. The parties differ over whether Harriette ever agreed to this arrangement.[3]

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[3] In a 1987 memorandum to Daniel, McSwiggan recollected that Harriette verbally approved the arrangement recommended by Van Der Wal. App. at 161. Harriette disputed the contention that she agreed to the monthly disbursements. According to a 1991 affidavit signed by Harriette, neither she nor the Estate "ever agreed to the amount of monthly distributions which Daniel Tabas authorized Tabas Enterprises to make to the Estate, or to [her] directly." App. at 349.

Whether Harriette agreed to the amount of the distributions is not directly relevant to the resolution of the dispute before us. Plaintiffs are not arguing that defendants attempted to defraud them of one-half of the monthly disbursements. Rather, the basis of their civil RICO complaint is that defendants attempted to defraud them of one-half of the full income which should have been distributed under the partnership agreement. App. at 1365. The parties argue at length over this point. Defendants assert that the plaintiffs knew soon after Charles' death that Daniel was receiving substantial compensation from Tabas Enterprises in addition to his monthly draw check. Consequently, defendants argue, plaintiffs could not have been deceived by the monthly checks which served as the basis of the mail fraud predicate acts. Plaintiffs acknowledge that they believed Daniel was taking more than he was entitled to under the partnership agreement. This was partly the basis for the 1986 state suit. However, they assert that they did not know the extent to which they were being short-changed until Price Waterhouse was given access to Tabas Enterprises' records. Consequently, plaintiffs assert, once they discovered the extent of the alleged unequal treatment, they initiated this suit.

In addition to the monthly income distributions, Harriette and Daniel had significant personal expenses paid by Tabas Enterprises. However, in September 1986, Tabas Enterprises stopped paying Harriette's personal expenses. The $10,000 monthly draw to Harriette was eliminated and in its place, a $15,000 monthly draw was paid to the Estate. At the same time, Daniel's monthly draw was increased to $15,000. In addition, Tabas Enterprises continued to cover Daniel's personal expenses and to pay him management fees.

Shortly thereafter the Estate brought suit against Daniel and others in the Montgomery County, Pennsylvania, Court of Common Pleas. The complaint alleged, inter alia, that the Estate was not being allocated an equal share, that Daniel used Tabas Enterprises funds for personal purposes, that Daniel misled the Estate by directing the preparation of false and misleading financial statements, and that Daniel had breached his fiduciary duties to the Estate.

On November 20, 1987, the parties settled the state suit and agreed that the assets of Tabas Enterprises would be sold. The settlement agreement established a schedule and method for liquidating the majority of the jointly held properties.[4] In conjunction with the liquidation of the joint assets, the settlement

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[4] The settlement agreement also provided that Daniel would purchase the Estate's interest in Acorn Iron and Supply Company and $1.5 million worth of Royal Bank stock. In addition, the Estate's interest in property on City Line Avenue was transferred to Daniel apparently in exchange for monies from Tabas Enterprises. Defendants, pointing to the $16.9 million that the Estate has received pursuant to the settlement agreement and liquidation of Tabas Enterprises, assert that the plaintiffs have been treated equally. While plaintiffs do not appear to dispute this amount, they do assert that they have not received an equal one-half of the income they are entitled to under the partnership agreement.

agreement provided that "the Estate shall be given complete access to all properties, books and records in connection therewith[.]" App. at 67 (Settlement Agreement ¶ 4(a)(i)). Another provision of the settlement agreement provided that the parties would agree to execute mutual general releases:

> requiring the dismissal with prejudice of all parties in all litigation between or among Daniel, on the one hand, and the Estate or any of its executors, on the other hand, and excluding only the terms and conditions contained herein.

App. at 69 (Settlement Agreement ¶ 9).

Lastly, the Honorable William H. Yohn, Jr.,[5] was named to act as the arbitrator of any future disputes which might arise from implementation of the settlement agreement and which could not be resolved by the parties' legal representatives. The settlement agreement specifically provided that in the event the representatives could not agree, Judge Yohn's decisions "shall be final, binding, and non-appealable." App. at 70 (Settlement Agreement ¶ 12). The settlement agreement was silent with regard to the distribution of income, subsequent to November 20, 1987, based on the 1964 partnership agreement. However, the settlement agreement did provide that:

> To the extent that the Partnership Agreement dated March 12, 1964 is not inconsistent with the provisions of this [Settlement] Agreement, the Partnership Agreement shall continue in full force and effect until the liquidation and auction [of Tabas Enterprises' assets] are completed.

App. at 70 (Settlement Agreement ¶ 13).

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[5] At that time, Judge Yohn sat on the Pennsylvania Court of Common Pleas. He is now a United States District Judge for the Eastern District of Pennsylvania.

On May 15, 1990, Daniel and the Estate executed the mutual general release called for in the settlement agreement. This "mutual release" provided that, except for the obligations of the parties under the settlement agreement, the parties would release and forever discharge one another from:

> any and all actions, causes of action, demands, judgments, contracts, debts, dues, accounts, bonds, covenants, contracts, suits, claims, and demands of any nature whatsoever, whether in law, equity, arbitration or otherwise, whether know [sic] or unknown at the present time, which [either party] ever had, now has, hereinafter can, shall or may have, by reason of any matter, cause or thing whatsoever, *from the beginning of the world to November 20, 1987.*

App. at 293 (emphasis added).

Despite the settlement agreement, plaintiffs remained dissatisfied with Daniel's compliance with the partnership and settlement agreements. On July 25, 1990, Judge Yohn held a hearing to consider whether the settlement agreement barred the Estate from asserting claims for breach of the partnership agreement stemming from Daniel's management of Tabas Enterprises subsequent to November 20, 1987.

As a result of the hearing, Judge Yohn held that the Estate could "pursue any claims which it may have against Daniel for the unequal distribution of the income of Tabas Enterprises subsequent to November 20, 1987." App. at 1187. (Arbitration Award No. 8). This decision was based on Judge Yohn's finding that: "The provision of the partnership agreement of March 12, 1964 concerning distribution of income is not inconsistent with the provisions of the settlement agreement of November 20, 1987

as the settlement agreement contains no provisions concerning the distribution of income after November 20, 1987."[6] *Id.*

Following this decision, Daniel's counsel requested that Judge Yohn mediate the issues raised by plaintiffs' proposed RICO complaint. Judge Yohn held two conferences with counsel to discuss, among other topics, the proposed RICO claims. During oral argument on February 1, 1991, Daniel's counsel asserted that the proposed RICO complaint was outside the scope of arbitration and that it could not be decided by Judge Yohn in his role as the arbitrator.[7] Nonetheless, Daniel's counsel expressed interest in having Judge Yohn serve as a mediator in an attempt to resolve the claims set forth in the proposed RICO complaint.

On February 20, 1991, Judge Yohn formally denied Daniel's request to mediate the dispute. Instead, Judge Yohn ordered that: "By agreement of the parties, and with the concurrence of the undersigned, the proposed 'RICO Complaint' may be filed in the United States District Court for the Eastern District of Pennsylvania and the issues raised therein will not be the subject of this procedure under the [Settlement] Agreement of November 20, 1987." App. at 1282 (Arbitration Award No. 10).

Soon thereafter, plaintiffs sued defendants in the federal district court, alleging violations of RICO's §§ 1962(a), (b), (c) and (d) as well as several state law claims stemming from

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[6] These rulings were premised with the finding by Judge Yohn that: "By agreement of the parties and with the concurrence of the arbitrator, the arbitrator has jurisdiction to rule upon the issue of whether the Estate may make claims against Daniel M. Tabas concerning his management of Tabas Enterprises subsequent to November 20, 1987." App. at 1185.

[7] Among other relief, plaintiffs' proposed RICO complaint sought damages against defendants who were not named in the settlement agreement and thus were outside of Judge Yohn's role as arbitrator of that agreement.

defendants handling and distribution of Tabas Enterprises' assets. The initial complaint was filed on March 4, 1991. An amended complaint was filed on May 20, 1991.[8]

The amended complaint alleges that the defendants conspired to defraud the Estate of its equal share of Tabas Enterprises' income, pursuant to the partnership agreement, through a pattern of racketeering activity including mail fraud in violation of 18 U.S.C. § 1341. Specifically, plaintiffs allege that defendants: conducted a scheme to defraud the Estate by diverting Tabas Enterprise funds for the use of Daniel and his family, understated the Estate's share of the income, and failed to distribute to the Estate its equal share of the income. App. at 26 (Amended Complaint ("AC") ¶ 33). Plaintiffs assert that, from the time of Charles' death and continuing through the period in which the amended complaint was filed, Daniel "continuously made false representations to the Estate by mail and fraudulently distributed millions of dollars of Tabas Enterprises funds to himself and members of his family in a scheme to defraud the Estate of income to which it was entitled." App. at 20 (AC ¶ 24).

Plaintiffs have appealed the district court's decision to grant defendants' motion for summary judgment. On appeal, we are required to base our review on the evidence of record. Therefore,

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[8] On May 29, 1991, the district court entered a scheduling order. This schedule provided, inter alia, that discovery be completed by December 2, 1991. The schedule also provided that defendants' motion for summary judgment had to be filed on or before October 21, 1991, and plaintiffs' response on or before November 4, 1991. Because this schedule required plaintiffs' response prior to the completion of discovery and because the parties had further disagreements about discovery, the factual record is not fully developed. Nonetheless, the record is sufficient to support our conclusion that the RICO continuity requirements have been met.

before we turn to the merits of the parties' assertions, a review of the record submitted to this Court is required.

Most significantly, the record contains two financial reports, examining Tabas Enterprises, that were prepared by Price Waterhouse for the Estate. Price Waterhouse was retained by plaintiffs' counsel to analyze financial and operational records of Tabas Enterprises in order to determine whether the books of Tabas Enterprises reflected the equal distribution of income as required under ¶ 3 of the partnership agreement.

The first report analyzed Tabas Enterprises' financial records dating from Charles' death in 1983 through early 1990. The report focused, however, on the period after November 20, 1987, which represented all activity after the settlement agreement. In late 1991, after the amended complaint was filed, Price Waterhouse completed a supplemental report, in which it analyzed Tabas Enterprises' records from October 1989 through July 1991. In total, the Price Waterhouse reports detailed more than three and one-half years of activity subsequent to the 1987 settlement agreement. In both reports, Price Waterhouse concluded that "the books and records of Tabas Enterprises do not reflect the equal distribution of income," and that "indications of fraud exist."[9] App. at 352, 460-61.

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[9] Price Waterhouse noted that its formal "opinion" was subject to scope limitations as discussed within each report. Our review of these limitations indicates that most were caused by Tabas Enterprises' failure to cooperate with the Price Waterhouse auditors. In addition, Price Waterhouse described Tabas Enterprises' major records depository as in a "state of disarray." In considering these reports, we will weigh the effect of the scope limitations in light of this conclusion that most limitations to the analysis were imposed by Tabas Enterprises in an effort to hinder the Price Waterhouse audits.

The Price Waterhouse reports can be divided into two sections: (1) benefits, other than direct monetary payments, received by Daniel and his family from Tabas Enterprises; and (2) direct monetary benefits received by Daniel and his family from Tabas Enterprises. We will first review the non-monetary benefits examined in the Price Waterhouse reports.

Price Waterhouse reported a substantial series of transactions to divert Tabas Enterprises' income for the use of Daniel and his family. In its first report, Price Waterhouse detailed a large number of items purchased using Tabas Enterprises' income for which there was no adequate documentation or explanation substantiating an ordinary and necessary business purpose of the expense. The report noted that, to the extent that Daniel purchased these items using Tabas Enterprises' income, such expenses "would inappropriately reduce the Estate's interest in Tabas Enterprises by reducing income available for distribution to the Estate." App. at 354. According to the Price Waterhouse report, these purchases included personal apparel, homeowner's dues for Daniel's vacation home in Vermont, meals and other purchases in cities where Daniel has vacation homes, meals and other purchases in ten foreign countries, prescription medicine, and a pool heater installed at Daniel's home in Pennsylvania. The total of these and other similar expenses approximated $140,000. Many of these expenses were charged on credit cards and paid for by Tabas Enterprises.

Price Waterhouse's second report noted that after its first investigation Daniel had reimbursed Tabas Enterprises for 38 percent of these expenses. In his deposition, Daniel testified that those expenses which were not reimbursed to Tabas Enterprises represented legitimate business expenses. However, in most of these instances, Daniel could not provide any specific recollection

of the business purpose for those expenses for which he did not reimburse Tabas Enterprises.[10]

The second report noted that many of the questionable expenses detailed in the first report were ongoing through the second report. For instance, the second report identified approximately $56,000 worth of items paid for by Tabas Enterprises for which there was no adequate documentation or explanation substantiating an ordinary and necessary business purpose. Many of the items highlighted by Price Waterhouse were the same as or very similar to those identified in its initial report.

In its first report, Price Waterhouse determined that Tabas Enterprises paid several individuals compensation for providing home services, such as maid services, gardening and handyman services, for Daniel and his family. Tabas Enterprises did not reflect a business purpose for these expenditures, totalling $67,000. This activity continued through the second report, costing Tabas Enterprises a further $78,000. In his response to plaintiffs' interrogatories, Daniel acknowledged that compensation had been paid by Tabas Enterprises to gardeners, maids, and/or

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[10] Plaintiff Levinson testified in his deposition that Daniel would occasionally make business calls from his home phone, travel for business purposes, and have other business expenses reimbursed by Tabas Enterprises. However, given the fact that Levinson stopped working for Tabas Enterprises prior to the settlement agreement and prior to the occurrence of any of the items identified in the Price Waterhouse report, his testimony is not useful to the defendants. McSwiggan, as Tabas Enterprises' Comptroller, testified in his deposition that no records, except the actual receipts, were kept which would identify the business nature of the expenses reimbursed or covered by Tabas Enterprises.

handymen who had performed services at his house. App. at 921. At his deposition, Daniel testified that two of these employees were essentially life-long employees who were receiving "pensions" from Tabas Enterprises. App. at 1689. Daniel stated that one of these individuals served breakfast and lunch for business meetings at his home, while the other watered the flowers and helped with the trash. In addition, he testified that other Tabas Enterprises' employees would perform minor maintenance around his residence.

The first Price Waterhouse report revealed that Tabas Enterprises owned and assigned 24 automobiles to Daniel and his family, although according to payroll records examined by Price Waterhouse not all of these persons were in fact employed by Tabas Enterprises. Of the 24 cars, seven were assigned to Daniel, one to his wife, and the remaining 16 to his children and their spouses. Price Waterhouse was advised by McSwiggan that the cars were allocated for 100% business use. Yet, according to the Price Waterhouse report, Tabas Enterprises' records did not reflect the extent of the business use. The report noted that Tabas Enterprises paid for the automobile insurance, repairs and maintenance, gasoline, car phones, auto club membership, registration fees, tags, and title fees for all 24 cars and drivers. Similar findings were made in the second report with respect to 18 cars owned by Tabas Enterprises and used by Daniel and his family. In his answer to plaintiffs' amended complaint, Daniel admitted that many of the defendants routinely used Tabas Enterprises' gasoline credit cards and gas station expense accounts without regard to whether the use was personal. App. at A136b.

Price Waterhouse identified several non-Tabas Enterprises assets which were insured under policies purchased by Tabas Enterprises. These included two properties which were transferred to Daniel pursuant to the settlement agreement and six antique automobiles owned by Daniel.

The Price Waterhouse report also noted Tabas Enterprises' payment of telephone bills at Daniel's primary and vacation residences without any documentation or explanation to support the business use of the telephones. This expense continued through the period covered by the second report, which noted that Tabas Enterprises had paid approximately $35,000 in phone bills.

Price Waterhouse examined whether Tabas Enterprises' income was being used to increase the value of assets, held solely by Daniel, namely Acorn Iron and Supply Company ("Acorn") and the property on City Line Avenue. The report identified expenses for these personal holdings, such as health insurance and travel, which had previously been paid by the entities themselves but which, after Daniel acquired sole ownership of them, were charged to Tabas Enterprises. Price Waterhouse also identified four employees, previously on Acorn's and City Line's payroll, who in 1987 were transferred to Tabas Enterprises' payroll. In his response to plaintiffs' interrogatories, McSwiggan stated that these employees were placed on the Tabas Enterprises' payroll "in order to allocate the expenses to the entity which their efforts were benefitting." App. at 939.

Lastly, Daniel stopped taking management fees from Acorn and City Line by the end of 1987, but his management fee from other Tabas Enterprises' entities then increased in an amount commensurate to the amount he had previously received from Acorn and City Line.

The second area examined by Price Waterhouse involved any direct monetary benefits received by Daniel and his family. The two Price Waterhouse reports detailed the amounts that Daniel received in salary, partnership distributions, management fees and incentives, gratuities, and bonuses from Tabas Enterprises. These came to $1,502,000 between November 1987 and November 1989, and to $1,166,000 between November 1989 and June 1991, for a total of $2,668,000. During this same period, the Estate received partnership distributions totalling $660,000. Price

Waterhouse also noted that, in addition to the compensation paid by Tabas Enterprises, Daniel worked for and received compensation as Chairman of the Board of Royal Bank, a non-Tabas Enterprise entity. At his deposition, Daniel testified that he worked 60-70 hours per week for Tabas Enterprises. App. at 1683. In response to how much time he spent at Royal Bank, he testified that he was there on Thursday mornings for executive staff meetings and one evening a month for a board meeting. App. at 614.

In addition to Daniel, Price Waterhouse reported that Daniel's family, including his six children and one son-in-law, received $1,363,000 in the form of salaries, management fees and incentives, gratuities, bonuses, and consulting fees from Tabas Enterprises between November 1987 and June 1991. The amended complaint alleges that payments to Daniel's children and his son-in-law "do not constitute reasonable salaries for work which they actually performed and that some of those children and/or their spouses were 'phantom' or 'ghost' employees who performed little or no work at all." App. at 21 (AC ¶ 25).

In its initial report, Price Waterhouse noted that, in addition to the compensation paid by Tabas Enterprises, certain members of Daniel's family also worked for and received compensation from non-Tabas Enterprises entities, including Royal Bank. For instance, Lee Tabas served as President of Royal Bank, Robert Tabas served as Vice President, and Susan Tabas Tepper served as Director of Marketing. Robert and Lee continued in their respective positions through the time period covered in the second Price Waterhouse report.

Finally, in addition to the above findings, both Price Waterhouse reports noted that "the Estate also may have been subjected to the risk of additional taxes, interest, and penalties"

due to apparent Internal Revenue Service reporting violations by Tabas Enterprises. App. at 362, 467.[11]

In their amended complaint, plaintiffs contend, inter alia, that: (1) Daniel violated § 1962(a) by using income received from Tabas Enterprises through a pattern of racketeering activity to invest in the establishment, acquisition, and operation of the Royal Bank of Pennsylvania; (2) Daniel, Campbell, and McSwiggan violated § 1962(b) by maintaining an interest and control of Tabas Enterprises through a pattern of racketeering activity; and (3) all of the defendants violated § 1962(c) by conducting or participating in conduct of Tabas Enterprises' affairs through a pattern of racketeering activity. App. at 40-42 (AC ¶¶ 45-47).[12]

Plaintiffs specifically allege that Daniel, Campbell, and McSwiggan committed 41 acts of mail fraud between December 1987 and February 1991 for "the purpose of executing the

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[11] Both reports noted that should the IRS disallow the deductions for personal items such as those it identified, the Estate could be at risk for increased taxes. In addition, the reports identified compensation, classified as a "Christmas expense," which was paid to certain Tabas Enterprise employees but not reported as compensation on W-2 forms prepared by Tabas Enterprises. These "Christmas expenses" totalled $219,700 since the settlement agreement, 79 percent of which was paid to Daniel, his family, or Campbell, all defendants in this action.

[12] Plaintiffs also allege that defendants used the United States mail to send checks to Daniel's children and son-in-law for compensation that they were not entitled to receive and as such, aided and abetted the pattern of racketeering activity that was allegedly occurring in violation of §§ 1962(b) and (c). App. at 42 (AC ¶ 48). However, plaintiffs provide no substantial evidence that these payroll checks were sent through the mail. To the contrary, McSwiggan testified in his deposition that payroll checks were sent by courier.

scheme to defraud the Estate of its equal share of income." App. at 43 (AC ¶ 49). Thirty-nine of these 41 acts represented monthly disbursements of $15,000 from Tabas Brothers (a holding of Tabas Enterprises) to the Estate. The remaining two acts involve the mailing of various IRS forms from Tabas Enterprises to the Estate reflecting income earned and business expenses incurred by certain Tabas Enterprises' entities. Plaintiffs contend that the mailing of the monthly checks "constituted an intentional misrepresentation" to the Estate by defendants that one-half of the income of Tabas Enterprises was being paid to the Estate pursuant to the partnership agreement. App. at 46 (AC ¶ 50). Plaintiffs assert that as a result "the Estate has suffered injury in its business and property by virtue of the loss of its equal share of income from Tabas Enterprises since November 20, 1987." App. at 48 (AC ¶ 56). Count II of the amended complaint alleges that defendants violated 18 U.S.C. § 1962 (d) by conspiring to violate §§ (a), (b), and (c).[13]

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[13] Counts III-VI of the amended complaint allege state law claims which are not central to this appeal. Count III alleged that Daniel, Campbell, and McSwiggan each owed, and breached, a fiduciary duty to the Estate based primarily on the allegations contained in Count I. Count IV alleged that Daniel breached the settlement agreement by obstructing the plaintiffs' efforts to market Tabas Enterprises' properties pursuant to the settlement agreement. Count V alleged that the defendants committed fraud based on the allegations in Count I. Count VI alleged that Daniel, Campbell, and McSwiggan improperly took an undetermined amount of money from Tabas Enterprises for use by Daniel and his family, and that the plaintiffs were deprived of an equal share of Tabas Enterprises' income. The district court dismissed these state law claims without prejudice. Because we find that the district court erred in dismissing Counts I and II, the district court will be instructed to vacate the dismissal of plaintiffs' supplemental state law claims.

In their memorandum in support of their motion for summary judgment, defendants assert that plaintiffs "have been aware since 1983 that the monthly checks represented a draw upon the income of Tabas Enterprises, not a complete distribution of the total income of Tabas Enterprises for each period," app. at 143, and that the Estate had been aware of Daniel's management fees since 1983. In addition, defendants contend that the Estate has received nearly $17 million from the liquidation of Tabas Enterprises. Plaintiffs contend, however, that, even if this last assertion is true, it does not mean that their suit is without merit. They argue that, notwithstanding any amount they have received, if that amount is less than the share they were entitled to under the partnership agreement, their claim is actionable.

Tabas Enterprises is currently in the process of liquidation pursuant to the settlement agreement. Apparently all but one of its properties had been sold as of the district court's decision. Plaintiffs contend, however, that at present Tabas Enterprises still has significant assets managed by Daniel.

In response to defendants' motion for summary judgment, the district court found that the dispute presented an insufficient threat to satisfy RICO's "continuity" requirement. The district court reasoned that:

> Plaintiffs' claims essentially allege one fraudulent scheme perpetrated against one victim by one perpetrator. The gist of plaintiffs' complaint is that Daniel Tabas has failed to abide by the partnership agreement made with his brother, Charles, and that Daniel has employed various methods of trickery to cheat Charles's heirs of their fifty percent share of the business that Charles and Daniel built. The sole victim of this scheme is Charles Tabas's estate. The sole perpetrator is Daniel Tabas or individuals under his control. No one else is affected. There is no threat to the community at large. This is not a case where the predicate acts are "part of an entity's regular way of

> doing business," such as would affect others doing business with the entity.
>
> The partnership between Charles and Daniel is currently in the process of liquidation. All of the fraudulent activity alleged in this suit will cease once the liquidation process is complete. Given the Court of Appeals' admonition that "it remains an open question whether RICO liability is ever appropriate for a single-scheme, single-victim conduct threatening no future harm," we simply do not find that the defendants' alleged conduct in this case "poses a societal threat worthy of the draconian penalties and remedies available under RICO."

District court opinion at 8-10; App. at 1376-78 (citations omitted) (footnotes omitted). Plaintiffs filed a timely notice of appeal of the district court's decision to grant summary judgment to the defendants. Defendants also filed an appeal, seeking review of the district court's decision to dismiss the state claims without prejudice.

II.

The district court had subject matter jurisdiction over this civil action pursuant to 28 U.S.C. §§ 1331 and 1367. The district court's federal question jurisdiction was invoked because Counts I and II of the amended complaint raise claims under RICO, 18 U.S.C. §§ 1961 and 1962. The district court's supplemental jurisdiction was invoked because Counts III though VI of the amended complaint raise claims that are so related to the claims in Counts I and II that they form part of the same case or controversy under Article III of the United States Constitution.

Appellate jurisdiction is conferred by 28 U.S.C. § 1291 over the final orders of the district court.[14]

This Court has plenary review over the district court's grant of summary judgment. *See Northern Ins. Co. v. Aardvark Assocs., Inc.*, 942 F.2d 189, 194 n.5 (3d Cir. 1991). On review of a district court's order for summary judgment, "we 'apply the same test the district court should have utilized initially.'" *Erie Telecommunications, Inc. v. Erie*, 853 F.2d 1084, 1093 (3d Cir. 1988) (citation omitted). "In reviewing a grant of summary judgment, we must be convinced 'that the prevailing party has successfully demonstrated that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" *Id.* (*citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)).

In determining whether summary judgment is appropriate, "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson*, 477 U.S. at 255. The inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-52.

III.

The first issue we must address is defendants' contention that this lawsuit is precluded by the 1987 settlement agreement and

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[14] The district court's first order, dated May 26, 1993, granted defendants' motion for summary judgment on Counts I and II, and dismissed Counts III, IV, and V pursuant to 28 U.S.C. § 1367(c)(3). The district court's second order, dated June 2, 1993, amended the first order to include dismissal of Count VI pursuant to § 1367(c)(3).

1990 mutual release. We find unpersuasive defendants' argument that the settlement agreement and mutual release preclude this suit.

First, binding arbitration by Judge Yohn holds the present claims viable. The settlement agreement provides for final, binding arbitration of any dispute "as to the provisions of this Agreement or as to the implementation or operation of the provisions of this Agreement" between Daniel and the Estate. App. at 70 (Settlement Agreement ¶ 12). The very issue of whether claims such as this lawsuit could be brought was submitted to the arbitrator. Judge Yohn determined initially that "the arbitrator has jurisdiction to rule upon the issue of whether the Estate may make claims against Daniel M. Tabas concerning his management of Tabas Enterprises subsequent to November 20, 1987." App. at 1185 (Arbitration Award No. 8). On the merits, Judge Yohn held that the Estate could pursue any claims which it might have against Daniel "for an alleged breach of his fiduciary duty [to the Estate] after November 20, 1987," and "for the unequal distribution of the income of Tabas Enterprises subsequent to November 20, 1987." *Id.* at 1187. Under the settlement agreement, Judge Yohn's decision is "final, binding, and non-appealable," app. at 70 (Settlement Agreement ¶ 12), and we must adhere to it under federal and Pennsylvania law. *See Apex Fountain Sales, Inc. v. Kleinfeld*, 818 F.2d 1089, 1094-95 & n.4 (3d Cir. 1987) (an arbitrators' decision is binding under federal law unless "an arbitrator 'manifests an infidelity'" to her obligation to interpret the agreement at issue or there is "corruption, fraud or partiality," or a party was denied "a fundamentally fair hearing") (citations omitted); *International Brotherhood of Firemen & Oilers v. School Dist. of Philadelphia*, 465 Pa. 356, 350 A.2d 804, 807-08 (Pa. 1976) (an arbitrator's decision shall not be set aside "unless it is alleged and proven by clear, precise and convincing evidence that the parties were denied a hearing or that there was fraud, misconduct, corruption or some other irregularity of this nature on the part of the

Arbitrator which caused him to render and unjust, inequitable or unconscionable finding"). Defendants have not alleged any action on the part of Judge Yohn amounting to corruption, fraud, or partiality. In addition, defendants have presented no evidence that Judge Yohn failed to provide a hearing to consider each party's views prior to his decision. In fact, the record clearly indicates that Judge Yohn held a hearing on this question and considered numerous exchanges of correspondence before ruling on this matter.

Second, defendants' reliance on *Main Line Theatres, Inc. v. Paramount Film Distrib. Corp.*, 298 F.2d 801 (3d Cir.), *cert. denied*, 370 U.S. 939, 8 L. Ed. 2d 807, 82 S. Ct. 1585 (1962), is misplaced. Defendants assert that *Main Line* stands for the proposition that where "the initial lawsuit contained prayers for injunctive relief, the execution of a general release releases and extinguishes complaints for future conduct." Defendant-appellees' Brief at 21. Consequently, defendants contend, plaintiffs' suit is barred by the settlement agreement and the mutual release signed by the Estate and Daniel.

In *Main Line*, plaintiffs demanded injunctive relief and treble damages in a civil antitrust suit stemming from Paramount's distribution of motion pictures. The district court dismissed the suit, holding that the case had been settled during pre-trial negotiations by an "oral agreement" between the parties. The oral agreement provided that Main Line would drop its suit in exchange for $10,000. Main Line refused to comply with the oral agreement, however, complaining that Paramount attempted to add language to the agreement when it was memorialized in writing. Specifically, Main Line rejected language which required it to acknowledge that the complained of distribution procedures were indeed reasonable.

On appeal, we considered whether the initial oral agreement included a release to the effect that Paramount could continue to

distribute films in the same manner it had prior to Main Line's suit for injunctive relief. This Court noted:

> Had this been an action for damages only, without a prayer that the defendants be restrained from continuing or repeating the licensing practices of which the plaintiff complained, the essential feature of any understanding to settle the suit for a stated sum would have been the plaintiffs' promise to forego a money claim, the only matter in controversy. Here, the suit contained a demand for injunctive prohibition of future wrongful conduct as well as a claim for money damages for alleged past misconduct. In such circumstances a reasonable person agreeing, *without any expression of limitation*, to accept a sum in settlement of the litigation should and reasonably would understand that both aspects of the suit were covered by the settlement.

298 F.2d at 803 (emphasis added).

In *Main Line*, plaintiffs could point to no limitations, expressed or implied, in their oral agreement with defendants. As such, their agreement to settle the suit covered their prayers for both injunctive relief and money damages. In the present case, the mutual release signed by plaintiffs and Daniel contains just such an expression of limitation. The mutual release is clear that the Estate only agreed to discharge Daniel from any claims arising from actions "from the beginning of the world to November 20, 1987." App. at 294. Unlike the plaintiffs in *Main Line*, the Estate did not agree that the settlement agreement precluded it from bringing suit based on future actions.

Defendants would have us focus on language in *Main Line* which states: "Certainly, a defendant offering a sum in settlement of a suit asking, among other things, *for an injunction against certain conduct*, would not understand that a similar demand could be asserted the day after settlement." 298 F.2d at 803

(emphasis added). However, the Estate's state suit, although denominated a "Complaint in Equity," did not seek broad "injunctive" relief. The holding in *Main Line* is premised on the fact that plaintiff specifically sought to enjoin Paramount from distributing motion pictures using methods which plaintiff alleged violated the civil antitrust laws. While defendants here point to the relief sought in the Estate's state suit, it does not amount to the type of injunctive relief sought by the plaintiff in *Main Line*. The plaintiffs in their state suit asked that Daniel be removed from any position at Tabas Enterprises and that its businesses and properties be liquidated. The state suit did not seek to leave Daniel in place at Tabas Enterprises while enjoining him from conducting the affairs of Tabas Enterprises by using methods which plaintiffs alleged constituted a scheme to defraud. Rather than controlling future conduct, the Estate's state suit primarily sought a break up of Tabas Enterprises along with redress for the alleged past wrongs committed against the Estate's interest in Tabas Enterprises' income. The second, federal action was not an effort to enjoin the very same conduct that the settlement of the first suit had resolved. This determination, together with our earlier finding that the settlement agreement bars only claims existing up to November 20, 1987, leads us to conclude that defendants' reliance upon *Main Line* is misplaced.[15]

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[15] Insofar as the settlement agreement would bar a suit based on events occurring before November 20, 1987, a court still would not be precluded from examining such events in making a determination of whether a RICO pattern existed. *See Big Apple BMW, Inc. v. BMW of North Am., Inc.*, 974 F.2d 1358,1361 (3d Cir. 1992), *cert. denied*, 122 L. Ed. 2d 659, 113 S. Ct. 1262 (1993) (examining events that occurred prior to statute of limitations bar to establish antitrust "pattern of conduct"). Just as it was acceptable to examine events "falling outside the statute of limitations" period because they were relevant "for the purpose

(continued...)

IV.

Turning to the substance of plaintiffs' claim, we will focus on the district court's decision that plaintiffs failed to allege a course of conduct sufficient to establish a RICO "pattern of racketeering activity" in that plaintiffs failed to satisfy RICO's "continuity" requirement.

RICO's § 1964 provides for civil damages for "any person injured in his business or property by reason of a violation" of § 1962. 18 U.S.C. § 1964(c). A common thread throughout § 1962 is that an injured party must demonstrate that the defendant was engaged in a "pattern of racketeering activity." Section 1962 provides, inter alia, civil and criminal remedies against any person: (1) who uses or invests income derived from "a pattern of racketeering activity" to acquire or operate any enterprise which is engaged in interstate commerce, § 1962(a); (2) who through "a pattern of racketeering activity" acquires or maintains any interest in or control of any enterprise engaged in interstate commerce, § 1962(b); or (3) who is "employed by or associated with any enterprise" engaged in interstate commerce to conduct or participate in the affairs of the enterprise through "a pattern of racketeering activity," § 1962(c). Section 1962(d) makes it unlawful for any person to conspire to violate subsections (a), (b), or (c). 18 U.S.C. § 1962(d). This dispute concerns only the civil remedies available under RICO. A person found in a civil action to have violated RICO is liable for treble damages, costs, and attorney's fees. 18 U.S.C. § 1964(c).

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[15](...continued)

of demonstrating a pattern of conduct" in *Big Apple BMW*, so too we find that it would be permissible to look to any pre-settlement agreement conduct to help establish a pattern in the present case. 974 F.2d at 1361. We find, however, no need to examine activities that pre-date the settlement agreement in order to find a viable RICO claim here. *See infra*, typescript at 43.

Central to this dispute is the question of whether defendants participated in "a pattern of racketeering activity" as defined by the statute and the federal courts. Under RICO, "racketeering activity" is defined to include any act indictable under 18 U.S.C. § 1341 relating to mail fraud.[16] 18 U.S.C. § 1961(1). As for a "pattern of racketeering activity," the RICO statute "requires at least two acts of racketeering activity," within a ten year period. 18 U.S.C. § 1961(5). As stated in *Sedima, S. P. R. L. v. Imrex Co., Inc.*, 473 U.S. 479, 496 n.14, 87 L. Ed. 2d 346, 105 S. Ct. 3275 (1985), "the implication [of § 1961(5)] is that while two acts are necessary, they may not be sufficient" to establish a pattern. Since *Sedima*, the Supreme Court and this Court, as well as many other federal courts, have addressed the question of what constitutes a pattern of racketeering activity under RICO.

Prior to the Supreme Court's decision in *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 106 L. Ed. 2d 195, 109 S. Ct. 2893 (1989) (explicating what constitutes a pattern under RICO), we stated in *Barticheck v. Fidelity Union*

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[16] 18 U.S.C § 1341 provides in pertinent part that:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Bank/First National State, 832 F.2d 36, 38-39 (3d Cir. 1987) that:

> [T]he existence of a RICO pattern does not turn on the abstract characterization of racketeering acts as "continuous" and "related" but rather on a combination of specific factors such as the number of unlawful acts, the length of time over which the acts were committed, the similarity of the acts, the number of victims, the number of perpetrators and the character of the unlawful activity.

In *H.J. Inc.*, the Supreme Court considered whether, in alleging a RICO pattern, plaintiffs were required to establish that defendants were involved in multiple "schemes." Noting that the word "scheme" is not found in the RICO statute, the Court proceeded to define the elements of the pattern requirement based on the statute itself and its legislative history. In its efforts to develop a meaningful concept of "pattern" within the existing statutory framework, the Court interpreted Congress' approach to the pattern element as: "intending a more stringent requirement than proof simply of two predicates, but also envisioning a concept of sufficient breadth that it might encompass multiple predicates within a single scheme that were related and that amounted to, or threatened the likelihood of, continued criminal activity." *Id.* at 237. "RICO's legislative history reveals Congress' intent that to prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity." *Id.* at 239.

The Court held that predicate acts are related if they "have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *Id.* at 240 (quoting the partially repealed Title X of the Organized

Crime Control Act of 1970, 18 U.S.C. § 3575, et seq.).[17] In addition to the relatedness of the predicate acts, the Court held that to establish a RICO pattern, it must be "shown that the predicates themselves amount to, or that they otherwise constitute a threat of, continuing racketeering activity." *Id.* Continuity, however, did not require that the plaintiff prove that defendant was involved in multiple schemes in order to satisfy the pattern requirement. *Id.* Rather, the Court adopted what it described as a "less inflexible approach," one which provided that defendants involved in a single scheme could be held liable under RICO as long as the continuity requirement was satisfied. *Id.* at 241. The Court proceeded to describe continuity as "both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." *Id.* "It is, in either case, centrally a temporal concept." *Id.* at 241-42.[18]

Plaintiffs assert that the duration of the fraudulent scheme is enough, in itself, to satisfy the continuity requirement. However, this assertion stands in stark contrast to our holdings since *H.J. Inc.* which have discussed the role of the *Barticheck* factors in

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[17] This prong of analysis has been met in the present case and has not been presented for appellate review.

[18] *Barticheck* was approvingly cited by the Supreme Court in *H.J. Inc.* for the proposition that "continuity" is both a closed- and open-ended concept. *Id.* at 241. In describing continuity in this manner, the Supreme Court in *H.J. Inc.* was insuring that the entire range of conduct could serve as a basis for RICO liability. Not only is ongoing conduct (*i.e.*, open-ended) actionable under RICO; conduct which is completed (*i.e.*, closed-ended) can be the basis for RICO liability. *See Barticheck*, 832 F.2d at 39 (rejecting the view that racketeering acts committed pursuant to one scheme can constitute a RICO pattern only if the scheme is potentially ongoing; "it is the completed scheme that inflicts the greater harm and more strongly implicates the remedial purposes of RICO.").

deciding whether a defendant's actions satisfy the continuity requirement. *See Marshall-Silver Constr. Co. v. Mendel*, 894 F.2d 593, 595 n.1 (3d Cir. 1990) (specifically rejecting the proposition that this Court should focus solely on the period of time over which the predicate acts occurred; all the *Barticheck* factors, except "similarity of the criminal acts" which goes to the question of relatedness, "remain, in greater and lesser degrees, relevant to the issue of continuity."); *Hindes v. Castle*, 937 F.2d 868, 873 n.3 (3d Cir. 1991) ("*Barticheck* factors, such as the number of acts, victims, and perpetrators and the character of the unlawful activity, may be relevant in some cases in assessing the threat of continuing criminal conduct by throwing light on whether the illegal activity was part of a legitimate business' regular way of conducting business, or whether the predicates were attributable to a 'long term association that exists for criminal purposes.'" (citation omitted)); *cf. Swistock v. Jones*, 884 F.2d 755, 758 (3d Cir. 1989) (district court's reliance on the small number of victims and small number of perpetrators as determinative factors on question of whether a pattern existed was misplaced in view of Supreme Court's decision in *H.J. Inc.*). To be sure, duration of the fraudulent scheme or schemes is a significant, even critical, factor that must be considered in deciding whether a plaintiff has satisfied the continuity threshold. In *Hindes*, we stated that the "post-*H.J. Inc.* cases decided by this court which have focused on pattern all make clear that duration is the sine qua non of continuity." 937 F.2d at 873. *See also Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1412 (3d Cir. 1991) ("The [Supreme] Court stressed that continuity is 'centrally a temporal concept.' Thus, the length of time over which the criminal activity occurs or threatens to occur is an important factor." (citation omitted)); *Swistock*, 884 F.2d at 757 ("district court correctly identified *long-term* racketeering activity or the threat thereof as the touchstone of the continuity concept." (emphasis added)).

Plaintiffs have provided evidence of the defendants' purported scheme to defraud the Estate out of an equal share of Tabas Enterprises' income over a more than three and half year period following the 1987 settlement agreement. The Price Waterhouse reports covered activity between November 20, 1987, and July 1991. This clearly constitutes a substantial period of time for purposes of the continuity analysis.

Given our precedents which hold that duration alone is not sufficient to establish continuity, the question is what else must plaintiffs demonstrate in order to satisfy the continuity requirement. *H.J. Inc.* instructs us to consider whether a defendant's conduct constitutes a threat of continuing long-term racketeering activity. The *Barticheck* factors would have us consider the number of unlawful acts, the number of victims, the number of perpetrators, and the character of the unlawful activity in assessing whether there is a threat of continuing criminal activity.

In *H.J. Inc.*, the Court stated that whether the predicate acts constituted a threat of continued racketeering activity depended on "the specific facts of each case." *Id.* at 242. The Court proceeded to note that in the context of an ongoing scheme, the continuity requirement could be satisfied "where it is shown that the predicates are a regular way of conducting defendant's ongoing legitimate business . . . or of conducting or participating in an ongoing and legitimate RICO 'enterprise.'" *Id.* at 243. In *H.J. Inc.*, plaintiffs alleged that Northwestern Bell Telephone Company had given a number of bribes over a six year period to members of the state commission which was responsible for regulating telephone rates with the objective of causing the commission to approve higher rates. The Court, reviewing plaintiffs' appeal of the defendant's successful 12(b)(6) motion, held that the plaintiffs' allegation was sufficient to satisfy RICO's

pattern requirement. With regard to continuity, the Court noted that:

> [Plaintiffs'] claim that the racketeering predicates occurred with some frequency over at least a 6-year period, which may be sufficient to satisfy the continuity requirement. Alternatively, a threat of continuity [of racketeering activity might be established at trial by showing that the alleged bribes were a regular way of conducting [defendant's] ongoing business, or a regular way of conducting or participating in the conduct of the alleged and ongoing RICO enterprise.

492 U.S. at 250.

In this respect, the Court analyzed the plaintiffs' complaint as asserting either activity which went on for some time but then stopped (closed-ended continuity) or past conduct that was combined with the threat of repetition (open-ended continuity). Under either concept, the Court found that plaintiffs' complaint satisfied the continuity requirement.

The evidence here persuades us that defendants' conduct was ongoing at the time plaintiffs filed this suit. The second Price Waterhouse report, which covered a period of time after plaintiffs' complaint was filed, makes clear that defendants continued to operate Tabas Enterprises in a manner very similar to the manner in which they operated it before plaintiffs' complaint was filed. Accordingly, we find it appropriate to consider defendants' activity "open-ended" for the purpose of our continuity analysis.

In considering whether plaintiffs can survive defendants' motion for summary judgment, we must decide whether there is an issue of material fact as it relates to whether piaintiffs can demonstrate a pattern of racketeering activity. In the context of an open-ended scheme, *H.J. Inc.* instructs us to evaluate whether defendants' conduct threatened future racketeering activity or

represented a regular way of conducting their ongoing business. As stated earlier, the *Barticheck* factors have a role in helping us assess whether there is a threat of continuing criminal activity.

Although *Kehr Packages* was ultimately determined to involve "closed-ended" conduct, our discussion there of the mail fraud statute in the context of a civil RICO complaint is helpful in analyzing whether defendants' conduct here constituted a pattern. In *Kehr Packages*, plaintiffs alleged that they were induced to procure a multi-million dollar loan based on misrepresentations by bank employees that additional working capital would be provided as needed. As expenses climbed and the vitality of their business was threatened, plaintiffs attempted to secure the additional working capital which had been promised. Instead, the bank refused the loan and plaintiffs' business collapsed.

Soon thereafter, plaintiffs brought a civil RICO suit, alleging that defendants misrepresented the bank's intention to lend additional funds in order to induce the plaintiffs to procure the initial loan. Plaintiffs alleged that by inducing them to secure the multi-million dollar loan, the bank would be the recipient of large monthly interest payments, profits, and collateral. As a basis for their RICO claim, plaintiffs asserted predicate acts of mail fraud in that the bank had mailed them monthly invoices on the loan that they had secured. The district court dismissed the complaint, holding that even if the court assumed the mail fraud as alleged by plaintiffs, they still had failed to establish a pattern under RICO. *Kehr Packages*, 926 F.2d at 1408. In *Kehr Packages*, we noted that in civil RICO complaints based on predicate acts of mail fraud "the continuity test requires us to look beyond the mailings and examine the underlying scheme or artifice. Although the mailing is the actual criminal act, the instances of deceit

constituting the underlying fraudulent scheme are more relevant to the continuity analysis." *Id.* at 1414 (emphasis added).[19]

In affirming the district court's decision to dismiss plaintiff's complaint in *Kehr Packages*, we held that "the allegations here involve a short term attempt to force a single entity into bankruptcy, and contain no additional threat of continued criminal activity." 926 F.2d at 1417.[20] In holding that the plaintiffs in

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[19] As a preliminary matter, we address defendants' assertion that the mailings involved must themselves be relied upon by the victim of fraud before a RICO claim may lie. Defendants' position is contradicted by this Court's pronouncements. The mail fraud statute has been "expansively construed." *Kehr Packages*, 926 F.2d at 1416. A person using the United States mail to further a scheme or artifice to defraud another has violated federal law. 18 U.S.C. § 1341. As this Court stated in *Kehr Packages*, "completely 'innocent' mailings can satisfy the mailing element." 926 F.2d at 1415 (citing *Schmuck v. United States*, 489 U.S. 705, 715, 103 L. Ed. 2d 734, 109 S. Ct. 1443 (1989)). Indeed, mailings "designed to lull the victims [of a completed fraud] into a false sense of security, postpone their ultimate complaint to the authorities, and therefore make the apprehension of the defendants less likely than if no mailings had taken place" have been found to create actionable mail fraud. *Kehr Packages*, 926 F.2d at 1416 n.3 (quoting *United States v. Lebovitz*, 669 F.2d 894, 896 (3d Cir.), *cert. denied*, 456 U.S. 929, 72 L. Ed. 2d 446, 102 S. Ct. 1979 (1982)).

[20] This holding is very similar to our finding in Hindes that "it remains an open question whether RICO liability is ever appropriate for a single-scheme, single-victim conduct threatening no future harm." 937 F.2d at 875. Like these cases, the district court in the present dispute characterized plaintiffs' claims as "essentially . . . one fraudulent scheme perpetrated against one victim by one perpetrator." App. at 1377. However, both this Court and Supreme Court have specifically rejected the

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Kehr Packages had failed to satisfy the continuity requirement, we distinguished *H.J. Inc.* on several critical aspects of the Supreme Court's decision in that case.

The first distinction we drew was the fact that the misrepresentations and criminal conduct alleged in *Kehr Packages* lasted only eight months, while the facts pled in *H.J. Inc.* indicated a scheme involving bribes over a six year period. The longevity of the defendants' conduct in the present dispute, lasting at a minimum three and one-half years, is closer to *H.J. Inc.* than it is to *Kehr Packages* and those cases in which we have not found a pattern present. *See Swistock*, 884 F.2d at 759 (plaintiffs' complaint alleging numerous acts of mail and wire fraud over 14 month period may be sufficient to establish the existence of a closed-ended scheme of sufficient length to satisfy continuity); *United States v. Pelullo*, 964 F.2d 193, 209 (3d. Cir. 1992) (holding that jury could find 19 month period of racketeering activity sufficient to satisfy continuity requirement).

The second distinction we drew in *Kehr Packages* was our belief that there was no apparent threat that the misrepresentations made by the bank employees would continue; thus they did not pose a continuing threat of criminal conduct. In contrast, the Supreme Court found in *H.J. Inc.* that the "alleged bribes were

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proposition that RICO requires more than one unlawful scheme for a pattern to exist. *See Barticheck*, 832 F.2d at 39 (rejecting the position that RICO pattern must involve at least two specific schemes); *H.J. Inc.*, 492 U.S. at 240-41 (same). We do not question our prior holdings which have not found a pattern in cases involving single-scheme, single-victim conduct threatening no future harm. The distinction we make here is that the current dispute involves conduct which we find is ongoing and threatening additional harm.

a regular way of conducting [defendant's] ongoing business." 492 U.S. at 250.

In the present dispute, plaintiffs have presented evidence of 39 separate checks mailed to the Estate from Tabas Enterprises, each in the amount of $15,000. In addition, plaintiffs presented evidence of certain tax documents mailed to them. While there is some dispute over whether these monthly disbursements represented the Estate's share in partnership income, the heart of this dispute is whether defendants took extraordinary expenses and compensation from Tabas Enterprises, thereby diminishing the income available to the Estate as required under the partnership agreement. We are instructed by *Kehr Packages* to focus on the underlying activity. 926 F.2d at 1414. Plaintiffs have presented evidence, through the Price Waterhouse reports, that defendants continuously took questionable expenses which had the foreseeable impact of lessening partnership income available to the Estate. The Price Waterhouse reports are replete with examples of expense charges made by defendants for which there is not adequate documentation or explanation to substantiate an ordinary and necessary business purpose. These included trips, meals, home services, cars, gasoline and insurance expenditures, and telephone bills. While defendants submitted evidence that certain of these items were reimbursed after the initial Price Waterhouse report, the second report noted that many of these same activities continued. This was defendants' regular way of doing business.

The next distinction we drew in *Kehr Packages* was predicated on the view that Kehr Packages as the holder of the loan represented a single victim, while the victims of the bribery scheme in *H.J. Inc.* were the very large number of the telephone company's customers. In making this distinction, we reasoned that Kehr Packages' individual shareholders, guarantors, and the holders of pledged collateral were "affected only indirectly" by the misrepresentations. *Id.* at 1418-19. Likewise, the defendants

here argue that the Estate is a single entity for the purposes of determining any alleged harm. Yet, each heir to the Estate will suffer directly any loss in income to the extent that the Estate is not being treated equally. However, even if we were to consider the Estate a single entity for purposes of determining harm, we do not view this as dispositive in view of the longevity of defendants' conduct. *See Swistock*, 884 F.2d at 758 ("The Supreme Court's unequivocal rejection of the multiple scheme rationale [in *H.J. Inc.*] makes it unlikely that the limited number of persons alleged to be victims of a scheme establishes as a matter of law that a plaintiff has failed to plead a RICO pattern.")

Lastly, we distinguished *Kehr Packages* from *H.J. Inc.* on the grounds that the "damage to plaintiffs was largely accomplished at the moment" when plaintiffs decided to secure the loan. *Id.* at 1419. Once the plaintiffs relied on the bank's misrepresentations and decided to secure the loan, the harm was completed. This was unlike the situation in *H.J. Inc.* in which the Court found that each individual bribe represented a separate injury. Once again, we find the facts in the present suit more comparable to *H.J. Inc.* than to *Kehr Packages*. Each time defendants here took a questionable expense, made a questionable charge, or received compensation to which they were not entitled, they lessened the income available to the Estate. Again, we are not focusing on the mailings here, but as directed by *Kehr Packages*, on the underlying scheme or artifice.[21]

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[21] To the extent that the distinctions between *Kehr Packages* and *H.J. Inc.* addressed the *Barticheck* factors, we see no need to repeat them here. The only factor not specifically addressed was the number of perpetrators. Even if we were to hold that defendants were, for the purposes of the pattern requirement, a very small number, that is not dispositive to the outcome of this case. *See H.J. Inc.*, 492 U.S. at 244 (RICO's language supplies no grounds to believe that Congress intended to limit the scope of

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In order to prevail on a motion for summary judgment, we must be convinced that defendants have successfully demonstrated that there is no genuine issue as to whether a "pattern of racketeering activity" existed. As stated previously, our review on this matter is plenary. Based on the evidence available to us in the record, we can not say that defendants are entitled to judgment as a matter of law. Plaintiffs have presented evidence to support their claim that defendants have engaged in a pattern of racketeering activity in violation of the equal distribution requirement of the partnership agreement. Even if we do not reach back to activity prior to the 1987 settlement agreement, plaintiffs' evidence suggests that this scheme has been ongoing for more than three and one-half years -- a substantial amount of time under any of our precedents. We do not address the merits of plaintiffs' claim. That, in the first instance, is a matter for the district court. What we do hold, however, is that plaintiffs have presented evidence that is legally sufficient to survive summary judgment.

Finally, in response to points raised by the dissent in regard to continuity, we note that the Supreme Court has instructed that "RICO is to be read broadly. This is a lesson not only of Congress' self-consciously expansive language and overall approach, but also of its express admonition that RICO is to 'be liberally construed to effectuate its remedial purposes.'" *Sedima*, 473 U.S. at 497-98 (citations omitted). Indeed, the Supreme Court has consistently struck down efforts by the courts of appeals to read RICO's breadth narrowly. *See National Organization for Women, Inc. v. Scheidler*, 127 L. Ed. 2d 99, 114 S. Ct. 798, 806 (1994) (rejecting Seventh Circuit decision that RICO requires proof that either the racketeering enterprise

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[21](...continued)

the Act to conduct of an association or group rather than of an individual acting alone).

or the predicate acts of racketeering were motivated by an economic purpose); *H.J., Inc.*, 492 U.S. at 250 (rejecting Eighth Circuit decision that RICO's pattern of racketeering activity concept requires proof of multiple "schemes"); *Sedima*, 473 U.S. at 493, 495 (rejecting Second Circuit decision that RICO requires proof of prior conviction on predicate act and that plaintiff demonstrate specific "racketeering injury" in order to maintain suit) *United States v. Turkette*, 452 U.S. 576, 582-85, 69 L. Ed. 2d 246, 101 S. Ct. 2524 (1981) (rejecting First Circuit decision which had the effect of excluding from RICO liability participation in an "enterprise" which performs only illegal acts and has not attempted to infiltrate a legitimate enterprise; RICO statute "applies to both legitimate and illegitimate enterprises.")

The dissent's fundamental concern is comparable to the concern of the court of appeals in *Sedima*. As the Supreme Court stated:

> Underlying the Court of Appeals' holding was its distress at the "extraordinary, if not outrageous," uses to which civil RICO has been put. Instead of being used against mobsters and organized criminals, it has become a tool for everyday fraud cases brought against "respected and legitimate 'enterprises.'"

473 U.S. at 499 (citations omitted). But the Supreme Court was quick to admonish that "Congress wanted to reach both 'legitimate' and 'illegitimate' enterprises." *Id.* (citation omitted). Perhaps more importantly given the facts of the present dispute, the Supreme Court proceeded to note:

> It is true that private civil actions under the statute are being brought almost solely against such defendants, rather than against the archetypal, intimidating mobster. Yet this defect--if defect it is--is inherent in the statute as written, and its correction must lie with Congress. It is not for the judiciary to eliminate the private action in

> situations where Congress has provided it simply because plaintiffs are not taking advantage of it in its more difficult applications.
>
> We nonetheless recognize that, in its private civil version, RICO is evolving into something quite different from the original conception of its enactors. Though sharing the doubts of the Court of Appeals about this increasing divergence, we cannot agree with either its diagnosis or its remedy. The "extraordinary" uses to which civil RICO has been put appear to be primarily the result of the breadth of the predicate offenses, in particular the inclusion of wire, mail, and securities fraud, and the failure of Congress and the courts to develop a meaningful concept of "pattern." We do not believe that the amorphous standing requirement imposed by the Second Circuit effectively responds to these problems, or that it is a form of statutory amendment appropriately undertaken by the courts.

Id. at 499-500 (citation omitted).

The dissent, citing *Barticheck* and *Marshall-Silver*, focuses on the "character of the unlawful activity" and concludes that plaintiffs have failed to satisfy RICO's continuity requirement in that they have not demonstrated that defendants' actions amount to "actual and threatened societal injury." We are fully aware of the language in *Marshall-Silver* which stands for the precept that duration alone is not enough to demonstrate continuity. 894 F.2d at 597. Indeed, we expressly rejected plaintiffs' assertion that duration alone is enough to satisfy the continuity requirement. However, we disagree with the dissent's interpretation of *Marshall-Silver* to mean that "continuity plays an important role in constraining operation of [the] RICO statute to only those activities which threaten societal injury." Dissent Typescript at 19 (emphasis added).

It is clear that continuity requires duration plus something more. In fraudulent schemes involving a single injury, such as *Marshall-Silver*, we suggested that "a more significant societal threat" was necessary. *Id.* at 597. However, this language was not central to our decision in that case, since we held that the *short duration* of the scheme was in and of itself insufficient to meet the duration requirement. It was for this reason that we stated in language which immediately follows a passage cited by the dissent:

> Fortunately, we are not required to resolve this important issue [of what more is needed] in order to decide the case before us. As in *Swistock*, the "vitality of the single . . . injury approach . . . after *H.J. Inc.* is an issue that will have to await . . . further case development."

Marshall-Silver, 894 F.2d at 597 (brackets omitted). As we stated in *Hindes v. Castle*, 937 F.2d at 875, a case decided after *Marshall-Silver*, "it remains an open question whether RICO liability is ever appropriate for a single-scheme, single-victim conduct threatening no future harm." (emphasis added). As explained earlier, we do not view the defendants' actions in this case as resulting in a single-injury." Rather, we held that each questionable action taken by defendants represented a separate injury. The alleged harm to plaintiffs did not occur all at once. Rather, the alleged harm increased over time as defendants engaged in their continuing conduct. *See also* n.21, *supra*.

Our focus on the nature of the unlawful conduct in this case has been directed at the evidence presented by plaintiffs that defendants' actions were ongoing, continuing even after plaintiffs' amended complaint was filed. The ongoing nature of defendants' activity is the essence of continuity. Unlike the dissent, we focused on the continuing nature of the underlying fraudulent conduct and not simply on the mailings themselves. *Kehr Packages*, 926 F.2d at 1414 ("Although the mailing is the actual criminal act, the instances of deceit constituting the underlying

fraudulent scheme are more relevant to the continuity analysis."). While the dissent appears to acknowledge this reasoning in *Kehr Packages*, it refuses to apply it.

The dissent also relies upon our recent decision in *Jordan v. Berman*, No. 92-1435 (3d Cir. Mar. 31 1994) for the proposition that civil RICO should not apply in disputes such as this one because of its limited harm to society. However, in Jordan the only mention of civil RICO is a very brief passage in which we summarily affirm the district court's decision to grant defendants' summary judgment motion. We find several significant differences between *Jordan* and the dispute here. First, the duration and continuing nature of the underlying fraudulent activity alleged here is much greater. In addition, the district court in *Jordan* questioned the "relatedness" of the predicate acts and held that plaintiffs had failed to demonstrate that they sustained any injury from the purported predicate acts. Neither finding is contested in the present dispute. Lastly, and perhaps most importantly, the district court in *Jordan* held that there was no evidence which could lead a jury to reasonably believe that defendants had committed mail fraud. As discussed earlier, we have come to a different conclusion in the present dispute.

We share the dissent's concern over the broad use of the civil RICO statute. Nonetheless, we are guided by the breadth of its operation given to it by Congress and the Supreme Court. It is up to the Congress to decide whether to narrow its scope. We are not in a position to do so by establishing the requirement of a "societal threat" which plaintiffs must satisfy in order to proceed with their action.

V.

Defendants have raised a number of alternative grounds for summary judgment claiming that insufficient causation and injury have been pleaded under RICO and that some of the defendants are not potentially liable under RICO. Because discovery has not

been completed, we find that it would be premature to address these alternative grounds. Plaintiffs have sought to take additional depositions that could have substantial bearing upon these issues. The district court did not rule on any of the alternative grounds; it would be inappropriate for us to consider them based on an incomplete factual record.[22]

VI.

For the foregoing reasons, we will reverse the district court's decision granting summary judgment against plaintiffs on their RICO claims, we will vacate the dismissal of plaintiffs' supplemental state claims, and we will remand this case to the district court for further proceedings consistent with this opinion.

GREENBERG, Circuit Judge, dissenting.

In its amended complaint, the Estate of Charles L. Tabas seeks to transform its dispute with the defendants over the proper allocation of a partnership's profits into a RICO case simply by alleging that the defendants used the United States mail to communicate with it over a substantial period of time. While we have not considered directly whether a plaintiff can bring a RICO action in such circumstances, our precedents clearly forbid such alchemy. *See Hughes v. Consol-Pennsylvania Coal Co.*, 945 F.2d 594, 609-11 (3d Cir. 1991), *cert. denied*, 119 L. Ed. 2d 224, 112 S.Ct. 2300 (1992); *Hindes v. Castle*, 937 F.2d 868 (3d Cir. 1991); *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406 (3d Cir.), *cert. denied*, 115 L. Ed. 2d 1007, 111 S.Ct. 2839 (1991); *Banks v. Wolk*, 918 F.2d 418 (3d Cir. 1990); *Marshall-Silver*

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[22] We would note that on remand the court should consider the effect upon this case had by the Supreme Court's decision in *Reves v. Ernst & Young*, 122 L. Ed. 2d 525, 113 S. Ct. 1163 (1993), which held that only defendants who participate in the operation or management of an enterprise can be held liable for violating 18 U.S.C. § 1962(c).

Constr. Co. v. Mendel, 894 F.2d 593 (3d Cir. 1990); *Swistock v. Jones*, 884 F.2d 755 (3d Cir. 1989). Therefore, I would affirm the summary judgment in favor of the defendants, and thus I respectfully dissent.[1]

I agree with the majority that the central issue in this appeal is whether the Estate has alleged that the defendants engaged in a "pattern of racketeering activity" as defined in 18 U.S.C. § 1961(5).[2] As noted by the majority, to establish a pattern of racketeering activity, a plaintiff "must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity." *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239, 109 S. Ct. 2893, 2900, 106 L. Ed. 2d 195 (1989) (emphasis in original). Thus, a plaintiff seeking to bring a RICO claim must allege, among other things, relatedness and continuity.

As the majority notes, the predicate acts are 41 instances of alleged mail fraud. Of these, 39 were the mailing of $15,000 checks to the Estate, representing monthly distributions from Tabas Enterprises. The remaining two were the mailing of yearly tax forms to the Estate. Amended Complaint ¶ 49, App. at 43-46. According to the amended complaint, the checks were sent from December 22, 1987, to February 19, 1991, a period of over three years. The Estate also alleges as predicate acts that the defendants used the United States mail to send checks to members of Daniel Tabas's family for work not performed. Amended Complaint

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[1] The Estate may have valid claims under state law, but I would hold that the district court did not abuse its discretion in dismissing these claims pursuant to 28 U.S.C. § 1367.

[2] I agree with the majority that this action is not precluded by the 1987 settlement and the subsequent mutual release.

¶ 51, App. at 46-47.[3] The majority, however, does not rely on these allegations as the Estate did not provide evidence that these checks were mailed, and the evidence on the motion for summary judgment established that they were delivered by courier. I agree with this disposition and thus conclude that we are concerned only with the mailing of the $15,000 checks and the tax forms.

I agree with the majority that these mailings are related. *See Kehr Packages*, 926 F.2d at 1414 (noting that relatedness test almost always will be satisfied "in cases alleging at least two acts of mail fraud stemming from the same fraudulent transaction"). However, in my view these mailings do not satisfy the continuity requirement as defined by the Supreme Court's and our precedents. In *H.J. Inc.*, the Supreme Court stated that continuity "is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." 492 U.S. at 241, 109 S. Ct. at 2902 (citing *Barticheck v. Fidelity Union Bank/First Nat'l State*, 832 F.2d 36, 39 (3d Cir. 1987)). If a plaintiff does not allege that the predicate acts lasted over a "substantial period of time," then it must allege a threat of continued criminal activity. 492 U.S. at 242, 109 S. Ct. at 2902; *Marshall-Silver*, 894 F.2d at 596. However, if a plaintiff alleges that the predicate acts lasted a substantial period of time, then it need not allege a threat of future criminal conduct. Therefore, a plaintiff alleging a closed-ended scheme has a lesser burden in that it does not have to demonstrate a threat of future harm and

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[3] In their brief, the defendants maintain that this allegation does not satisfy the pleading requirements of Fed. R. Civ. P. 9(b). Brief at 30 n.6; *see Banks v. Wolk*, 918 F.2d at 422 n.1 (noting that allegations of mail fraud must be plead with specificity required by Fed. R. Civ. P. 9(b)). I do not address this contention because even assuming that the pleading requirement is met, the allegations were refuted and, in any event, the Estate's allegations as a whole do not state a claim under RICO.

a greater burden in that it must establish that the predicate acts continued over a substantial period of time.

Although we do not have a bright-line rule establishing how long the predicate acts must last to constitute a "substantial period of time," I will assume that the period of over three years in this case would satisfy any such definition. Yet, simply by clearing this duration hurdle, the Estate does not establish continuity.[4] Rather, as the majority concedes, we have stated clearly and repeatedly that duration is a necessary but not sufficient condition to proving continuity. Typescript at 34-36, 48. In *Hindes v. Castle*, for example, we stated:

> The post-*H.J. Inc.* cases decided by this court which have focused on pattern all make clear that duration is the sine qua non of continuity. While it is not in itself sufficient to establish a pattern, a determination that must be made in light of all of the *Barticheck* factors, no pattern can be shown without the required duration.

937 F.2d at 873 (emphasis added). Likewise, in *Marshall-Silver* we recognized:

> If the Court in *H.J. Inc.* intended that the duration of the predicate acts or the threat arising therefrom should be

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[4] I treat this case as a case of close-ended continuity because I assume that defendants' alleged conduct occurred over a substantial period of time. *H.J., Inc.*, 492 U.S. at 241-42, 109 S. Ct. at 2902. The majority considers defendants' activity to be "open-ended" because it was ongoing at the time the Estate filed its complaint. Typescript at 38. The majority's view requires that the Estate allege a threat of future criminal conduct to establish continuity, *H.J., Inc.*, 492 U.S. at 242-43, 109 S. Ct. at 2902-03, *Marshall-Silver*, 894 F.2d at 596, and thus strengthens my position that the Estate's allegations do not satisfy the continuity requirement.

> determinative without reference to whether the societal threat was limited to a single, one time injury, we would not have expected the Court to eschew providing a specific standard in favor of a fact oriented, case-by-case development.

894 F.2d at 597 (emphasis in original) (dicta); *see also Kehr Packages*, 926 F.2d at 1412 (noting that "the length of time over which the criminal activity occurs or threatens to occur is an important factor," but not stating that it is dispositive). Accordingly, a more detailed analysis of the complaint is required.[5]

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[5] Our rule that duration is a necessary but not sufficient condition to establish continuity is consistent with the Supreme Court's statement in *H.J. Inc.*: "petitioners claim that the racketeering predicates occurred with some frequency over at least a 6-year period, which may be sufficient to satisfy the continuity requirement." 492 U.S. at 250, 109 S. Ct. at 2906 (emphasis added). By using the word "may," the Court implicitly rejected the notion that duration alone establishes continuity.

Precedents in other circuits could be read to suggest that duration alone can satisfy continuity. *See, e.g., Dana Corp. v. Blue Cross & Blue Shield Mutual*, 900 F.2d 882, 886-87 (6th Cir. 1990) (stating that in a single-scheme, single-victim case "the allegations of fraud occurring for a period of seventeen years, along with the specific mailings evidencing such a scheme, are sufficient to state a claim of a pattern of racketeering activity"); *Fleet Credit Corp. v. Sion*, 893 F.2d 441, 446-47 (1st Cir. 1990) (finding that 95 fraudulent mailings sent over a four and one-half year period are sufficient to establish continuity); *Walk v. Baltimore & Ohio & R.*, 890 F.2d 688, 690 (4th Cir. 1989) (reversing dismissal where complaint alleged 10-year scheme to defraud plaintiffs); *Jacobson v. Cooper*, 882 F.2d 717, 720 (2d Cir. 1989) (stating that continuity existed because predicate acts alleged occurred over "a

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In *Barticheck v. Fidelity Union Bank/First Nat'l State*, 832 F.2d 36, we set forth six factors that a court should address in considering whether the plaintiff has alleged a pattern of racketeering: (1) the number of unlawful acts; (2) the length of time over which the acts were committed (duration); (3) the similarity of the acts; (4) the number of the victims; (5) the number of perpetrators; and (6) the character of the unlawful activity. *Id.* at 39. Although we decided *Barticheck* before the Supreme Court's decision in *H.J. Inc.*, we have noted in post-*H.J. Inc.* cases that the *Barticheck* factors are still relevant and must be considered "'as they bear upon the separate questions of continuity and relatedness.'" *Hindes*, 937 F.2d at 873 (quoting *Banks*, 918 F.2d at 423); *accord Midwest Grinding Co., Inc. v. Spitz*, 976 F.2d 1016, 1023-25 (7th Cir. 1992) (noting that factors set forth in *Morgan v. Bank of Waukegan*, 804 F.2d 970, 975 (7th Cir. 1986), which are similar to *Barticheck* factors, apply even after *H.J. Inc.*). In Marshall-Silver, we recognized that all of the *Barticheck* factors except the third, the similarity of criminal acts, are relevant to the

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[5](...continued)

matter of years"). However, it is not clear that in any of these cases, the courts of appeals faced a factual situation analogous to the one presented here, *i.e.*, a dispute over the profits of a partnership. The case most similar to this one is *Jacobson*. In *Jacobson*, the plaintiff alleged that the two defendants, one of which was his son, attempted to defraud him out of real estate holdings that he owned. While the nature of the dispute is somewhat similar, the alleged predicate acts went beyond mail fraud and included extortion, larceny, offering false instruments for filing, and usury. 882 F.2d at 719. Thus, the character of the unlawful activity in *Jacobson* is vastly different than that alleged here. In any event, we are bound not by *Jacobson*, but by our earlier precedents, which clearly state that duration alone is not sufficient to establish continuity.

question of continuity. 894 F.2d at 595 n.1; *see also Hindes*, 937 F.2d at 873 (reaffirming this view). Thus, the question of continuity is an "'inquiry into the extent of the [defendant's] racketeering activity,'" *Marshall-Silver*, 894 F.2d at 595 (quoting *Barticheck*, 822 F.2d at 40), and requires an examination of the five *Barticheck* factors relevant to continuity. Moreover, in applying these factors, we must take a "natural and commonsense approach" to continuity. *H.J. Inc.*, 492 U.S. at 237, 109 S. Ct. at 2899.

The first factor, the number of unlawful acts, might appear to weigh in favor of continuity as the Estate alleged that the defendants engaged in over 40 predicate acts. However, as we stated in *Kehr Packages*, "the continuity question should not be affected by the fact that a particular fraudulent scheme involved numerous otherwise 'innocent' mailings, rather than only a few." 926 F.2d at 1414. Rather, what needs to be considered is the underlying scheme: "Although the mailing is the actual criminal act, the instances of deceit constituting the underlying fraudulent scheme are more relevant to the continuity analysis." *Id.*; *see also Midwest Grinding Co.*, 976 F.2d at 1024 ("Although the sheer number of predicate acts might appear at first glance to prove continuity, when it comes to a pattern premised on acts of mail or wire fraud, the volume of mailings is not dispositive.").

In this case, the alleged underlying scheme was an attempt to defraud the Estate out of its rightful share of the partnership income. Thus, the allegations of fraud relate to a discrete dispute, rather than to numerous distinct attempts to defraud. The majority suggests that the defendants' conduct satisfies the continuity requirement because of the "ongoing nature" of the mailings and because each mailing caused a separate injury to plaintiffs. Typescript at 49. However, as we stated in *Kehr Packages*, "it should not be relevant . . . that [the defendants] sent [checks] on a monthly basis, rather than quarterly or yearly." 926 F.2d at 1414. Thus, "the sizable number of mailings does not show that

the defendants operated a long-term criminal operation." *Midwest Grinding Co.*, 976 F.2d at 1025. Accordingly, this factor weighs against a finding of continuity.

The second factor is duration. As I noted above, the alleged fraudulent activity lasted for at least three years. However, the significance of the length of the alleged scheme is diminished by the nature of the scheme itself. In this regard, I reiterate that essentially the same allegedly fraudulent act was repeated over three years. Thus, this is not a case in which each mailing constituted a new fraudulent act. *See Kehr Packages*, 926 F.2d at 1415 (distinguishing *Fleet Credit Corp. v. Sion*, 893 F.2d 441 (1st Cir. 1990), because in *Fleet Credit* "each mailing constituted a new fraudulent act"). As we noted in *Marshall-Silver*:

> Where such a fraudulent scheme inflicts or threatens only a single injury, we continue to doubt that Congress intended to make the availability of treble damages and augmented criminal sanctions dependent solely on whether the fraudulent scheme is well enough conceived to enjoy prompt success or requires pursuit for an extended period of time.

894 F.2d at 597. Therefore, while the second factor, duration, does weigh in favor of continuity, it is not a heavy weight on the scale.

The third factor, the number of victims, weighs against a finding of continuity for, as the district court correctly indicated, this is a single-victim case. The Estate disputes this conclusion, contending that all six of the beneficiaries of the Estate are victims, including a charitable foundation that ultimately benefits hundreds, if not thousands, of people. Brief at 27 n.18. Yet, this argument is supported neither by the case law nor the amended complaint itself. In *Kehr Packages*, we addressed a situation analogous to this one and found that the only victim of the defendants' alleged criminal activity was the company, Kehr

Packages, and not its shareholders or its guarantors. We reached this conclusion because "Kehr's individual shareholders and guarantors, and the holders of pledged collateral, were affected only indirectly." 926 F.2d at 1418-19; *see also Hughes*, 945 F.2d at 611 (noting that alleged scheme affected single victim, "albeit a class of victims," in rejecting RICO claim). Similarly, here the scheme affected the beneficiaries of the Estate only indirectly.

Additionally, throughout its amended complaint, the Estate maintains that the fraudulent conduct deprived it, the Estate, of its rightful share of the income. Indeed, according to the 1964 Partnership Agreement, the deceased party's share of the income is payable to his estate, not to his heirs. App. at 155. While it is true that the presence of only one victim, like the existence of only one scheme, does not necessarily preclude the finding of a RICO pattern, this fact clearly weighs against the finding of continuity. *See United States Textiles, Inc. v. Anheuser-Busch Cos.*, 911 F.2d 1261, 1268 (7th Cir. 1990).

The fourth factor, the number of perpetrators, does appear to weigh in the Estate's favor. The district court stated that there was only one perpetrator, "Daniel Tabas or individuals under his control." Opin. at 8-9. But this conclusion is inherently contradictory for even if the other perpetrators are under Daniel's control, they still exist. In fact, the district court's description could be used to describe an organized crime family, yet clearly Congress meant RICO to cover organized crime. Nonetheless, this error is not significant for even if the number were as large as the Estate would like us to believe, the fact that more than one person was involved in a scheme to defraud that lasted a substantial period of time without more cannot establish continuity. Indeed, in some ways this factor is the least important factor. *Cf. Wade v. Hopper*, 993 F.2d 1246, 1251 (7th Cir.) (per curiam) (listing factors relevant for continuity determination similar to those listed in *Barticheck* but not including number of perpetrators), *cert. denied*, 126 L. Ed. 2d 151, 114 S. Ct. 193

(1993); *Morgan v. Bank of Waukegan*, 804 F.2d at 975 (listing same factors in pre-*H.J. Inc.* case). Thus, this factor does not place a heavy weight on the continuity side of the scale.

The final factor, the character of the unlawful activity, is perhaps most important in assuring that RICO is applied in a manner consistent with congressional intent. Congress intended to prevent long-term criminal activity, but not to federalize every garden-variety claim of fraud. "The concept of 'continuity' plays an important constraining role in the operation of the RICO statute" by requiring a court to examine not only the "period of time over which the predicate acts occurred or . . . during which any threatened criminal activity would be likely to last," but also the character of the predicate acts and the extent of the actual and threatened societal injury generated by the acts. *Marshall-Silver*, 894 F.2d at 596-97. In this case the benign character of the alleged acts of mail fraud and the limited extent of the societal injury weigh heavily against the Estate. "Repeated mailings in furtherance of a single scheme to inflict one fraudulent injury may be no indication of the underlying fraud's continuity." *Shields Enters., Inc. v. First Chicago Corp.*, 975 F.2d 1290, 1295 (7th Cir. 1992). Moreover, as I already have noted, this case evolves from an ongoing dispute regarding the appropriate split of a partnership's profits. The allegations of fraud do not pertain to how Tabas Enterprises conducts its business, but only to its internal functioning.

The complaint is rife with contentions that the defendants' activity defrauded the Estate out of its fair share of the partnership's income. Yet the Estate does not allege that the defendants' conduct has ramifications outside the confines of the immediate dispute regarding the division of the partnership's profits. Thus, the threat to society is minimal at most. *See Meade v. Meade*, 1991 WL 243539, *5 (E.D. Pa. Nov. 18, 1991) ("This is a dispute between a small number of parties, and neither directly affects nor has wider implications for a large

number of people. Actual and threatened societal injury is little, if any. Finally, each alleged act of mail and wire fraud forms part of one, extended scheme, reinforcing the essentially isolated nature of the alleged racketeering activity."), *reconsideration denied*, 1992 WL 6929 (E.D. Pa. 1992), *aff'd*, 998 F.2d 1004 (3d Cir. 1993) (table); *Rumbaugh v. Chandler*, 1991 WL 169046, *4 (E.D. Pa. Aug. 27, 1991) (App. at 1893-900) ("This action does not concern an extensive criminal enterprise whose long-standing, repeated conduct has caused and will continue to cause a severe injury to the community. Rather, it is a private dispute between two ex-partners that has continued over twelve years in various forms."). Therefore, after my consideration of the character of the unlawful activity, together with the other relevant *Barticheck* factors, both qualitatively and quantitatively, I have concluded that continuity has not been demonstrated and that this case is yet another attempt by a plaintiff "to fit a square peg in a round hole by squeezing garden-variety business disputes into civil RICO actions." *Midwest Grinding Co.*, 976 F.2d at 1025.

I make one final but critical point with respect to the character of the unlawful activity alleged. I focus on this point because I regard it as the most significant *Barticheck* factor in this case. As the majority points out, 39 of the predicate acts consist of the mailing of a $15,000 check to the Estate and the other two concern mailing tax forms. Reliance on such predicate acts is problematic because the Estate is pleading in essence that the defendants committed "mail fraud" by sending it money. This reliance seems strange, for usually the perpetrator of a mail fraud receives rather than sends funds.

Of course, the Estate's real complaint is not that the defendants sent it $15,000 per month; but rather that the Estate should have received much more. Thus, I agree with the majority that "the basis of [the Estate's] civil RICO complaint is that defendants attempted to defraud them of one-half of the full

income which should have been distributed under the partnership agreement." Typescript at 6 n.3. Yet the mailing of a check to a person legitimately entitled to the money being sent is so benign an act that it is a thin foundation on which to build the continuity element.[6] At bottom, regardless of the pejorative words which the Estate uses to characterize the defendants' conduct, this case involves a commercial dispute over a discrete issue, the amount due to the Estate in its monthly draws. Such a dispute is simply not a RICO controversy.

To me the unreasonableness of regarding the mailing of the thirty-nine $15,000 checks as RICO predicate acts may be demonstrated further by considering what would have happened if the defendants had paid nothing to the Estate over the three-year period in which they actually paid $585,000. If the defendants had mailed nothing, then they could not have committed mail fraud and the Estate could not have pleaded a RICO case, as there would have been no predicate acts on which to base the complaint. In that circumstance, the Estate, rather than seeking threefold damages under RICO, 18 U.S.C. § 1964(c), would have been limited to a state law compensatory damages claim. I thus ask the following question: is it conceivable that Congress intended that RICO could be applied to a defendant who mails substantial payments to the plaintiff, but not to the same defendant if it paid the plaintiff nothing? The question answers itself. Defendants who pay nothing are surely more culpable than defendants who pay $585,000. In this case, it was in the Estate's interest that it receive the $15,000 monthly

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[6] I am aware of *Schmuck v. United States*, 489 U.S. 705, 714-15, 109 S. Ct. 1443, 1450, 103 L. Ed. 2d 734 (1989) ("To the extent that Schmuck would draw from these previous cases a general rule that routine mailings that are innocent in themselves cannot supply the mailing element of the mail fraud offense, he misapprehends this Court's precedents."), and thus I give some weight to the mailing.

payments rather than nothing, and the defendants' mailing of the checks benefited the Estate and cannot be used to demonstrate continuity. This case cannot be brought under RICO.

I recognize that the majority has listed numerous questionable expenses charged against Tabas Enterprises and I further acknowledge that the defendants may have state law liability for some of these expenses. But it is important in considering this case to keep in mind that the incurring of these expenses is not the predicate criminal conduct charged in this case. Rather, the predicate acts to establish RICO jurisdiction are the use of the mails to disburse checks and to distribute forms.

In reaching my conclusions, I have taken particular note of our very recent opinion in *Jordan v. Berman*, No. 92-1435 (3d Cir. Mar. 31, 1994), which affirmed the district court's judgment granting certain of the defendants "summary judgment on the RICO claim against them for failure to show relatedness and continuity . . . essentially for the reasons given by the district court." Slip op. at 6 n.2. The district court opinion is reported at 792 F. Supp. 380 (E.D. Pa. 1992). *Jordan* is a complex case involving a controversy between tenants and a landlord, the details of which I need not discuss. But as germane here, the district court concluded that the plaintiffs had not adduced "evidence from which one could reasonably find a pattern of racketeering activity under prevailing case law." *Id.* at 388. The district court explained the basis for its decision as follows:

> Few relationships in our society seem to engender more conflict than that of landlord and tenant. The aggressive landlord and the disgruntled tenant have almost become stereotypical. The *instant case involves a typical landlord-tenant dispute about the construction of a lease and what sums or services the respective parties are entitled to*. Permitting trash to accumulate for a day, disrupting utility service for half a day and vigorously pursuing a plausible contract interpretation are generally

> not the kind of things from which RICO cases are made. The actions of defendants and their agents, however characterized, do not pose the type of significant societal threat that RICO was designed to deter or penalize.

Id. (emphasis added). By affirming "essentially for the reasons given by the district court," we approved the foregoing statement, even though the case involved the use of the mails and thus in theory could have been a RICO case.

If we substituted the relationship between partners for the landlord-tenant relationship involved in the underscored language in the above quotation, it would describe this case. Certainly the partnership relationship, like the landlord-tenant relationship, is the frequent source of disputes. The dispute in this case, to quote from *Jordan v. Berman*:

> involves a typical [partnership] dispute about the construction of a [partnership agreement] and what sums . . . the respective parties are entitled to. . . . The actions of defendants and their agents, however characterized, do not pose the type of significant societal threat that RICO was designed to deter or penalize.

Thus, this case is no more a RICO case than was *Jordan v. Berman*. The majority indicates that there are "several significant differences" between this case and Jordan, and I agree with that observation. But these differences are not germane to the purpose for which I cite *Jordan, i.e.*, that it demonstrates the appropriate approach which we should take to the dispute in this case.

This case is readily distinguishable from *United States v. Pelullo*, 964 F.2d 193 (3d Cir. 1992), which the majority cites and on which the Estate relies. *Pelullo* is a post-*H.J. Inc.* case in which we found that a RICO violation could be proved based on a closed-ended scheme that lasted 19 months. In *Pelullo*, the defendant was a chief executive officer of The Royale Group, Ltd., a publicly held corporation which through subsidiaries

acquired six hotels in Miami Beach. In June 1984, the hotels obtained a $13.5 million loan from a subsidiary of American Savings and Loan Association. Under the terms of the loan, $6.2 million was to be used for renovation, with American retaining this portion and disbursing the funds as renovation costs were incurred. To obtain a disbursement, Royale was required to submit draw requests which set forth a certified itemization of the costs.

The indictment charged Pelullo with three fraudulent schemes: (1) defrauding American, Royale, and Royale's shareholders by submitting false documents in connection with certain draw requests; (2) defrauding Royale of $114,000 by diverting cash from one of its subsidiaries to repay a debt Pelullo owed; and (3) defrauding Royale of approximately $500,000 by diverting money for uses other than for the purposes of the loans. Thus, the alleged number of schemes in *Pelullo* was larger than the one scheme alleged here. And while the number of victims in *Pelullo* could be characterized as small, the nature of the unlawful activity had a different ring to it, because in *Pelullo* the alleged perpetrator was an officer in a public company and the main victims (American and Royale) were public entities. Moreover, the alleged fraud was not confined to Royale's internal operations, but took place in the context of its normal external business operations. Thus, *Pelullo* involved much more than a dispute between partners, and it is only instructive here to illustrate the contrast between a real RICO case and the Tabas's dispute.

While I do not intend to suggest that a plaintiff alleging a single fraudulent scheme injuring a single victim in the context of a private dispute never can maintain a RICO claim, it would be unusual for such a case to be covered by RICO, especially where the alleged predicate acts are mail fraud. In reaching this conclusion, I am cognizant that "RICO's pattern requirement does not require the existence of more than one 'scheme,'"

Marshall-Silver, 894 F.2d at 596, and that the Supreme Court has declared that the RICO statute should be read broadly "to reach both 'legitimate' and 'illegitimate' enterprises," *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499, 105 S. Ct. 3275, 3286, 87 L. Ed. 2d 346 (1985).

The majority analogizes my rejection of RICO's application here to the position of the court of appeals in *Sedima*. Typescript at 46. In *Sedima*, the Supreme Court rejected the "amorphous standing requirement imposed by the Second Circuit," but acknowledged that "RICO is evolving into something quite different from the original conception of its enactors" and attributed this evolution in part to "the failure of Congress and the courts to develop a meaningful concept of 'pattern.'" *Sedima*, 473 U.S. at 499-500, 105 S. Ct. at 3286-87. *Sedima* preceded our decisions in *Barticheck* and *Marshall-Silver* and the Supreme Court's decision in *H.J., Inc.*, which developed the "meaningful concept of 'pattern'" that I would apply to this case. Thus, my position is consistent with both the language from *Sedima* cited by the majority, typescript at 47, and subsequent cases and is on a continuum with those authorities. Our precedents clearly establish that Congress did not intend for RICO to cover every garden-variety fraud. *See Marshall-Silver*, 894 F.2d at 597; *accord Midwest Grinding Co.*, 976 F.2d at 1025 ("It is equally evident that RICO has not federalized every state common-law cause of action available to remedy business deals gone sour."). Rather, the Supreme Court, "by refocusing the pattern requirement on the sort of long-term criminal activity that carries some quantum of threat to society," *Midwest Grinding Co.*, 976 F.2d at 1025, has attempted "to prevent RICO from becoming a surrogate for garden-variety fraud actions properly brought under state law," *id.* at 1022; *see also Marshall-Silver*, 894 F.2d at 596-97 (noting that continuity plays an important role in constraining operation of RICO statute to only those activities which threaten societal injury).

In my view, the majority's opinion inexorably will result in federalizing numerous internal business disputes in a way that Congress never could have intended. The opinion as applied in this circuit will lead attorneys to repackage ordinary commercial controversies in which the parties have communicated by mail or wire as RICO actions. Indeed, it seems obvious that the principles of this case could be applied to routine commercial disputes in many situations in which the parties have been in an ongoing relationship, *e.g.*, partnerships, tenancies, employer-employee, service contracts, supply contracts, equipment rentals, brokerage accounts, and others as well. A party in such a relationship, dissatisfied with the other party's performance, will be able to establish RICO jurisdiction by alleging fraud and pointing to the other party's numerous mailings in furtherance of its understanding of the terms of the relationship. For the foregoing reasons, I dissent.

HARRIETTE S. TABAS, et al.

v.

DANIEL M. TABAS, et al.

CIVIL ACTION No. 91-1355

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

May 26, 1992, Decided

COUNSEL: Richard A. Sprague, Sprague, Creamer & Sprague, Philadelphia, Pa., for plaintiffs. Harold E. Kohn, Kohn, Savett, Klein & Graf, P.C., Philadelphia, Pa, for defendants. Gregory M. Harvey, Morgan, Lewis & Bockius, Philadelphia, Pa, for movant.

MEMORANDUM

Dalzell, J.

This bitter family dispute arises from a partnership agreement between two brothers, Daniel Tabas and Charles Tabas. Since Charles's death in 1983, the surviving family members have been engaged in innumerable arguments over the proper distribution of income and liquidation of assets from the family's varied and valuable businesses. After four years of contention in state court, Charles's heirs, plaintiffs in this action, seek federal redress pursuant to the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 et seq.

Following a year of discovery, in which the parties have invested fortunes in counsel and accountants' fees, defendants have moved for summary judgment. For the reasons which follow, defendants' motion will be granted.

1. Factual Background

After working together since they were young men, Daniel and Charles Tabas in 1964 entered into a partnership agreement

governing the operations of Tabas Enterprises, a multi-million dollar operation comprised of various entities engaged in entertainment, real estate, and other business activities. Under the partnership agreement, all property was to be owned jointly, with the two brothers having equal ownership shares in all property and equal shares in the distribution of all income. The agreement further provided that upon the death of either brother, the partnership was to continue with the surviving brother making all management decisions, which would be binding upon the personal representatives of the deceased brother's estate, and the deceased brother's share of distributable income was to be paid to his estate. Lastly, the agreement imposed upon the survivor a fiduciary duty to the estate of the deceased.

Charles Tabas died in 1983. Disputes among the survivors began almost immediately after his funeral, and culminated in litigation in the Montgomery County, Pennsylvania, Court of Common Pleas in 1986.[1] After the litigation had proceeded, the parties on November 20, 1987 entered into a settlement agreement that resolved only the manner in which the sale of Tabas Enterprises' assets would be sold. Ultimately, eleven such assets were sold, but each transaction required the intervention of the Honorable William H. Yohn, Jr., then of the Montgomery County Common Pleas Court, who acted as arbitrator pursuant to the 1987 agreement.

The parties' behavior toward one another in the sale process led to yet more tension, and Charles's heirs eventually sought Judge Yohn's ruling as to whether the 1987 "settlement" (such as it was) barred the assertion of federal RICO claims, as well as claims for breach of fiduciary duty. Judge Yohn on February 20, 1991 held that the "settlement" of November 20, 1987 did not "bar the proposed 'RICO Complaint' [which] may be filed in the

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[1] Harriette S. Tabas, et al. v. Daniel M. Tabas, No. 86-15492 (C.C.P. Montgomery Cty., Pa., Law Division).

United States District Court of the Eastern District of Pennsylvania and the issues raised therein will not be the subject of [the] procedure under the Agreement of November 20, 1987."[2] Plaintiffs, the executors of Charles Tabas's will, twelve days later filed this suit based on what, in essence, is a breach of fiduciary duty claim against Daniel Tabas and his children, as well as two officers of Tabas Enterprises. In order to invoke this court's jurisdiction, plaintiffs have cast their claims in the language of the RICO statute.[3]

Plaintiffs contend that defendants, in a scheme to defraud Charles Tabas's estate, have failed to distribute to the estate a true fifty percent share of Tabas Enterprises' income.[4] Plaintiffs further assert that defendants, by using the mails to send fraudulent distribution checks and tax returns to the estate, and by mailing checks to pay expenses improperly charged to Tabas Enterprises, have committed many acts of mail fraud in violation of 18 U.S.C. § 1341, which in turn constitute the necessary predicate acts for a violation of RICO, 18 U.S.C. § 1961 et seq.[5]

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[2] Estate of Charles L. Tabas, Deceased, C.C.P. Montgomery Cty. Orphans' Court Division, No. 85123, Arbitration Award No. 10, ¶ 2.

[3] Plaintiffs have asserted two counts of RICO and RICO conspiracy in addition to state law claims of breach of fiduciary duty, breach of contract and fraud.

[4] See transcript of March 5, 1992 oral argument at 26 (hereinafter "tr.").

[5] Much debate exists about the extent and number of actual mailings. While it seems clear that, as in all businesses, the mails were occasionally used, our analysis below in no way depends upon the resolution of this unedifying issue.

2. Summary Judgment Standard

As noted at the beginning of this memorandum, the parties engaged in intensive discovery for a year. Plaintiffs also engaged the services of Price Waterhouse & Co. to do an audit of Tabas Enterprises' books. This audit was, to risk understatement, a prodigious undertaking. The filing of defendants' summary judgment motion has occasioned the submission of a voluminous record, including Price Waterhouse's reports. We benefitted from extensive oral argument on March 5, 1992, as well as from supplemental briefing we invited on certain issues, the last being filed on April 15 which addressed certain issues raised by the Supreme Court's recent decision in *Holmes v. Securities Investor Protection Corporation*, ___ U.S. ___, 112 S.Ct. 1311 (1992). While we remain well short of the summary judgment record set before Judge Becker in *Matsushita*,[6] that decision constitutes authority for disposition by summary judgment even in cases where, as here, the plaintiff alleges a conspiracy and proffers mountains of paper to suggest the existence of genuine issues of material fact, within the meaning of Fed.R.Civ.P. 56(c).

Pertinent to our disposition here, it is worth rehearsing that an issue is "genuine" only if there is a sufficient evidentiary basis on which a reasonable jury could find for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). A factual dispute is "material" only if it might affect the outcome of the suit under governing law, *id.* at 248, and all inferences must of course be drawn, and all doubts resolved, in favor of the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); *Gans v. Mundy*, 762 F.2d 338, 341 (3d Cir.), *cert. denied*, 474 U.S. 1010 (1985).

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[6] *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 513 F. Supp. 1100 (E.D.Pa. 1981), *rev'd*, 723 F.2d 238 (3d Cir. 1983), *rev'd*, 475 U.S. 574 (1986).

We are mindful that the movant for summary judgment bears the initial burden of identifying for the Court those portions of the record that it believes demonstrate the absence of dispute as to any material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). To defeat summary judgment, the non-moving party "may not rest upon the mere allegations or denials of [its] pleading, but [its] response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). The non-moving party must demonstrate the existence of evidence that, if the factfinder believed it, would support a finding in its favor. *See Anderson*, 477 U.S. at 248-49.

3. Legal Analysis

We naturally begin with a review of the statute plaintiffs invoke. The RICO statute provides that "any person injured in his business or property by reason of a violation of [18 U.S.C. § 1962]" may bring a civil suit to recover treble damages and attorney's fees. 18 U.S.C. § 1964. Plaintiffs here contend that Daniel Tabas and his family have violated all four subsections of 18 U.S.C. § 1962.

Section 1962(a) prohibits "any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity" from using or investing that money to acquire, establish or operate an enterprise affecting interstate commerce. Section 1962(b) forbids "any person through a pattern of racketeering activity . . . to acquire or maintain . . . any interest in or control of any enterprise" affecting interstate commerce. Section 1962(c) forbids "any person employed by or associated with any enterprise [affecting interstate commerce] to conduct or participate . . . in the conduct of such enterprise's affairs though a pattern of racketeering activity." Lastly, section 1962(d) forbids "any person to conspire to violate any of the provisions of subsections (a), (b), or (c)."

Common to each of the subsections of § 1962 is the requirement that defendants engaged in "a pattern of racketeering activity," which requires the commission of at least two predicate offenses within ten years of each other. 18 U.S.C. §§ 1961(1),(5). In order "to prove a pattern of racketeering activity, a plaintiff . . . must show that the racketeering predicates are related and that they amount to or pose a threat of continued criminal activity." *H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 239 (1989) (emphasis in original).

The relatedness of defendants' alleged acts of mail fraud is not in dispute. The continuity prong of the pattern requirement, however, presents a more difficult question. Although "the relatedness test will nearly always be satisfied in cases alleging at least two acts of mail fraud stemming from the same fraudulent transaction . . . the continuity test requires us to look beyond the mailings and examine the underlying scheme or artifice." *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1414 (3d Cir.), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2839 (1991).

In general, the RICO pattern requirement is evaluated based upon a combination of specific factors, including (1) the number of unlawful acts, (2) the length of time over which the acts were committed, (3) the similarity of the acts, (4) the number of victims, (5) the number of perpetrators, and (6) the nature of the unlawful activity. *Barticheck v. Fidelity Union Bank*, 832 F.2d 36, 39 (3d Cir. 1987).

Where mail fraud is alleged, however, unlike other types of racketeering activity, the number of mailings is not as important in evaluating continuity as is the nature of the underlying fraudulent activity. *Kehr Packages*, 926 F.2d at 1414. Nor is it necessarily important that the mailings "might have continued for years." *Id.* at 1417. The very nature of mail fraud is such that, while "virtually every garden-variety fraud is accomplished through a series of wire or mail fraud acts that are 'related' by purpose and are spread over a period of at least several months,"

in cases "where such a fraudulent scheme inflicts or threatens only a single injury . . . [it is] unlikely that Congress intended RICO to apply in the absence of a more significant societal threat." *Marshall-Silver Construction Co. v. Mendel*, 894 F.2d 593, 597 (3d Cir. 1990).

Such is the case here. Plaintiffs' claims essentially allege one fraudulent scheme perpetrated against one victim by one perpetrator. The gist of plaintiffs' complaint is that Daniel Tabas has failed to abide by the partnership agreement he made with his brother, Charles, and that Daniel has employed various methods of trickery to cheat Charles's heirs of their fifty percent share of the business that Charles and Daniel built. The sole victim of this scheme is Charles Tabas's estate.[7] The sole perpetrator is Daniel Tabas or individuals under his control. No one else is affected. There is no threat to the community at large. This is not a case

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[7] Plaintiffs claim that all of Charles's executors and beneficiaries are RICO victims ("You're talking about an Estate that has many, many beneficiaries." Tr. at 25.). This argument is contrary to the keystone of plaintiffs' theory here. All injury they complain about stems from the claim that they stand in Charles's shoes under the 1964 partnership agreement. They assert that the measure of Daniel's wrongdoing is the disparity between Daniel's benefits from Tabas Enterprises compared with what Charles's would have been had he lived. In economic and legal reality, therefore, in the plaintiffs' own view of the case the victim is Charles. Additionally, it is worth noting that plaintiffs' argument proves too much. On their theory, even if Charles were alive they would still be victims, as would, for that matter, all of Charles's creditors who would suffer in their "business or property" because Charles would have less money than he would have been entitled to under the partnership agreement, thereby making them less secure. Plaintiffs' victim argument, therefore, only demonstrates once again how easy it is to allege a rhetorical RICO claim, but not one that withstands scrutiny against underlying legal reality.

where the predicate acts are "part of an entity's regular way of doing business," such as would affect others doing business with the entity. *See*, by contrast, *H.J.*, 492 U.S. at 242 (telephone company charged with making numerous bribes to public utilities commissioners to approve unfair rates), and *Swistock v. Jones*, 884 F.2d 755 (3d Cir. 1989) (real estate owners allegedly making material misrepresentations with regard to several potential leasing transactions).

The partnership between Charles and Daniel is currently in the process of liquidation. All of the fraudulent activity alleged in this suit will cease once the liquidation process is complete.[8] Given the Court of Appeals' admonition that "it remains an open question whether RICO liability is ever appropriate for a single-scheme, single-victim conduct threatening no future harm," *Hindes v. Castle*, 937 F.2d 868, 875 (3d Cir. 1991) (emphasis added), we simply do not find that the defendants' alleged conduct in this case "poses a societal threat worthy of the draconian penalties and remedies available under RICO." *Marshall-Silver*, 894 F.2d at 597. *See also Rumbaugh v. Chandler*, No. 90-5418, slip op. at 9 (E.D. Pa. filed Aug. 27, 1991) (Shapiro, J.) (private dispute between two ex-partners continuing over twelve years does not present a sufficient societal threat for RICO to apply).

4. Conclusion

This action is a most regrettable war between sides of a very successful family that has added much to the economy of the Philadelphia area. Putting aside the staggering costs both sides have invested in this conflict, the highest price paid has been the

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[8] We do not for a moment underestimate the potential for further disputes as these assets are liquidated. The point, however, is that the process has an inevitable terminus, fortified by the provisions of § 4.(a) of the November 20, 1987 agreement.

probably mortal wound that has been suffered by a family that has so much to contribute to each other and to society. It appears, however, that this waste and pain will continue, but it must do so in the state court that has traditionally been open to family disputes of this nature.

For the reasons discussed above, defendants' motion for summary judgment as to the RICO claims will be granted. Plaintiffs' state law claims will be dismissed pursuant to 28 U.S.C. § 1367(c)(3).

An Order follows.

ORDER

AND NOW, this 26th day of May, 1992, upon consideration of defendants' motion for summary judgment, plaintiffs' responses, oral argument and supplemental submissions, and for the reasons set forth in the accompanying Memorandum, it is ORDERED AS FOLLOWS:

1. With respect to Counts I and II of plaintiffs' amended complaint, defendants' motion for summary judgment is GRANTED and JUDGMENT IS HEREBY ENTERED in favor of defendants and against plaintiffs; and,

2. Counts III, IV and V of the amended complaint are hereby DISMISSED pursuant to 28 U.S.C. § 1367(c)(3).

BY THE COURT:

Stewart Dalzell, J.

§ 1961. Definitions

As used in this chapter --

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472 and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim or informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958

(relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251, 2251A, 2252, and 2258 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles)m sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of that title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree or any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

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Conflicting Pattern Continuity Standards

Standards Based on Conceptual Scope of RICO

First Circuit	Single episode does not constitute a pattern even if it involves multiple crimes. *Apparel Art, Int'l v. Jacobson*, 967 F.2d 720, 722-23 (1st Cir. 1992)
Fourth Circuit	One scheme, one goal, limited purpose, one perpetrator, one set of victims, one year duration does not constitute pattern. *Menasco, Inc. v. Wasserman*, 886 F.2d 681, 684 (4th Cir. 1989).
Fifth Circuit	Single, discrete, and otherwise lawful commercial transaction does not constitute pattern even though multiple acts of fraud over five years. *In re Burzynski*, 989 F.2d 733, 743 (5th Cir. 1993).
Sixth Circuit	Single victim, single scheme, single purpose and 17 months duration does not constitute pattern. *Vemco, Inc. v. Camardella*, 23 F.3d 129, 135 (6th Cir.), *cert. denied*, 115 S. Ct. 579 (1994).
Ninth Circuit	Predicate acts designed to bring about a single event do not demonstrate pattern continuity. *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1535 (9th Cir. 1992).

Standards Using Multiple Factors

Seventh Circuit	Factors: 1) number and variety of predicate acts and their duration; 2) number of victims; 3) presence of separate schemes; and 4) occurrence of distinct injuries. *McDonald v. Schencker*, 18 F.3d 491, 497 (7th Cir. 1994).
Tenth Circuit	Factors: 1) duration; and 2) extensiveness of scheme, including: a) number of victims; b) number of predicates; c) variety of predicates; d) distinctiveness of injuries; e) complexity and size of scheme; and f) nature or character of the activity. *Resolution Trust Corp. v. Stone*, 998 F.2d 1534, 1543 (10th Cir. 1993).
District of Columbia Circuit	Factors: 1) number of schemes; 2) number and extent of injuries; 3) number of victims; 4) number and scope of goals; 5) number of predicates; and 6) duration. *Edmondson & Gallagher v. Alban Towers Tenants Ass'n*, ___ F.3d ___, No. 93-7146, 1995 U.S. App. Lexis 4670 at *10-11 (D.C. Cir. March 10, 1995).

Standards Focusing on Duration Alone

Third Circuit	Focused on duration alone. *Tabas v. Tabas*, Pet. App. 2a, 33a-36a (3d Cir. 1995) (in banc).
Eighth Circuit	Focused on duration alone. *Primary Care Investors, Seven, Inc. v. PHP Healthcare Corp.*, 986 F.2d 1208, 1215-16 (8th Cir. 1993). *But see Terry A. Lambert Plumbing, Inc. v. Western Sec. Bank*, 934 F.2d 976, 980-81 (8th Cir. 1991) (applying a standard similar to that of the Fourth Circuit in *Menasco*, 886 F.2d at 684)
Eleventh Circuit	Focused on duration alone. *Cox v. Administrator of United States Steel & Carnegie*, 17 F.3d 1386, 1397 (11th Cir.), *modified*, 30 F.3d 1347 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 900 (1995).

Standards Focusing on Nature of the Activity, In Addition to Its Duration

Second Circuit	Focused on nature of the activity, as well as its duration. *United States v. Aulicino*, 44 F.3d 1102, 1111-14 (2d Cir. 1995).

No. 94-1629

Supreme Court, U.S.
FILED
MAY 10 1995
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In The

Supreme Court of the United States

October Term, 1994

DANIEL M. TABAS, JOSEPH P. CAMPBELL, JAMES J. McSWIGGAN, LEE A. TABAS, ROBERT TABAS, SUSAN TABAS TEPPER, LINDA TABAS STEMPEL, JOANNE TABAS WURZAK, CAROL TABAS STOFMAN and HOWARD WURZAK,

Petitioners,

vs.

HARRIETTE S. TABAS, RICHARD S. TABAS, NANCY C. TABAS and GERALD LEVINSON, as Executors of the Estate of Charles L. Tabas,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

This civil action was brought under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), Pub. L. No. 91-452, Title IX, 84 Stat. 941, as amended, 18 U.S.C. §§ 1961-1968 (1984 ed. & 1995 Supp.). Plaintiffs-respondents presented substantial evidence on summary judgment (including two comprehensive financial reports prepared by the national accounting firm Price Waterhouse) that defendants-petitioners committed a series of related predicate acts of mail fraud over a period of at least three and one-half years and that said unlawful activity was their regular way of doing business. The questions presented are:

1. Must plaintiffs-respondents additionally demonstrate a "threat of societal harm" separate and distinct from the threat that is *ipso facto* posed by such long-term criminal conduct, merely because the scheme at issue is one to defraud a decedent's estate and its numerous beneficiaries of millions of dollars?

2. Should this Court "amend" RICO by requiring proof of the existence of an independent "societal threat" beyond the commission of the criminal predicate acts over a substantial period of time, under circumstances where Congress has considered precisely such an amendment but has never enacted it?

3. Should this Court grant review of the constitutionality of the civil RICO statute under circumstances (i) where petitioners failed to raise the question in the district court, in the court of appeals in the first instance, or in the court of appeals on rehearing *in banc*, and (ii) where there is no claim of unconstitutionality of the underlying mail fraud statute?

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No. 94-1629

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

DANIEL M. TABAS, JOSEPH P. CAMPBELL, JAMES J. McSWIGGAN, LEE A. TABAS, ROBERT TABAS, SUSAN TABAS TEPPER, LINDA TABAS STEMPEL, JOANNE TABAS WURZAK, CAROL TABAS STOFMAN, and HOWARD WURZAK,

Petitioners,

v.

HARRIETTE S. TABAS, RICHARD S. TABAS, NANCY C. TABAS, and GERALD LEVINSON, as Executors of the Estate of Charles L. Tabas,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

The respondents Harriette S. Tabas, Richard S. Tabas, Nancy C. Tabas, and Gerald Levinson, as Executors of the Estate of Charles L. Tabas, plaintiffs in the district court, respectfully pray that this Court deny the Petition for a Writ of

Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Third Circuit entered on February 13, 1995.

OPINIONS BELOW

The *in banc* opinion of the United States Court of Appeals for the Third Circuit, dated February 13, 1995, is reported at *Tabas v. Tabas*, 47 F.3d 1280 (3d Cir. 1995). While petitioners reported that the Third Circuit's *in banc* opinion had been amended three times since February 13, 1995, *see* Petitioners' Appendix at 2a, petitioners included some, but not all, of the amendments in their reproduction of the opinion below. Petitioners did not include the first item from Judge Becker's February 23, 1995 amendment, but included the second through fourth items therein; petitioners included the first item from Judge Roth's March 1, 1995 amendment, but did not include the second through fifth items therein; and, petitioner did not include Judge Alito's March 7, 1995 amendment. In addition, Judge Becker's concurring opinion was amended again on May 2, 1995. For the Court's reference, respondents reproduce the amendments of February 23, 1995, March 1, 1995, March 7, 1995 and May 2, 1995, in Respondents' Appendix at 1b–8b.

STATEMENT OF JURISDICTION

Respondents agree that jurisdiction to review the judgment of the United States Court of Appeals for the Third Circuit by writ of certiorari is conferred upon this Court by 28 U.S.C. § 1254(1) (1988). Respondents do not agree, however, that the petition for a writ of certiorari properly draws into question the constitutionality of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), Pub. L. No. 91–452,

Title IX, 84 Stat. 941, as amended, 18 U.S.C. §§ 1961–1968 (1984 ed. & 1995 Supp.), inasmuch as petitioners did not challenge the constitutionality of the RICO statute in the district court, in the court of appeals in the first instance, or in the court of appeals on rehearing *in banc*.

STATEMENT OF CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Petitioners failed to set forth in their Appendix a pertinent portion of the federal mail fraud statute, *to wit*, 18 U.S.C. § 1946 (1988). That statute states:

> For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

18 U.S.C. § 1946 (1988).

STATEMENT OF THE CASE

This civil action was brought under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), Pub. L. No. 91–452, Title IX, 84 Stat. 941, as amended, 18 U.S.C. §§ 1961–1968 (1984 ed. & 1995 Supp.), by respondents Harriette S. Tabas, Richard S. Tabas, Nancy C. Tabas, and Gerald Levinson, as Executors of the Estate of Charles L. Tabas, plaintiffs in the district court (hereinafter "plaintiffs" or "the Estate"). Plaintiffs brought their RICO action against petitioner Daniel M. Tabas (brother of the late Charles Tabas) and others (hereinafter "defendants"). The gravamen of plaintiffs' RICO complaint, filed on March 4, 1991 and amended on May 20, 1991, is that from November 21, 1987,

and continuing to May 20, 1991, and into the future, defendants conducted and continue to conduct the affairs of Tabas Enterprises (a fifty-fifty partnership that was created by Daniel Tabas and Charles Tabas to conduct real estate and other business ventures) through a pattern of racketeering activity, in violation of 18 U.S.C. § 1962(c), proximately causing millions of dollars in injury to the Estate of Charles Tabas.[1] In opposition to defendants' motion for summary judgment, plaintiffs presented substantial evidence (including two comprehensive financial reports prepared by the national accounting firm Price Waterhouse) that defendants committed a series of related predicate acts of mail fraud over a period of three and one-half years and that said unlawful activity was their regular way of doing business.[2] The district court granted summary judgment on the basis that plaintiffs had not satisfied the continuity prong of RICO's pattern of racketeering requirement. The court of appeals in the first instance and the court of appeals upon rehearing *in banc* reversed.

For further detail regarding the Statement of the Case, plaintiffs hereby incorporate by reference the comprehensive statement of the case that was set forth by the United States Court of Appeals for the Third Circuit, sitting *in banc*. (App.

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[1]Plaintiffs also brought claims under 18 U.S.C. § 1962(a), (b) and (d). Plaintiffs' claims against defendants for damages caused from the time of Charles Tabas' death in 1983 through November 20, 1987 were settled between the parties, and are not the subject of plaintiffs' RICO action.

[2]Price Waterhouse conducted two examinations of the books and records of Tabas Enterprises; the first review was for the period November 20, 1987 through December 31, 1989 and the second review was for the period January 1, 1990 through June 30, 1991.

at 3a–16a.)[3] That statement, Part I of the court's opinion, was joined by a majority of the judges *in banc*. (Resp. App. at 8b, Becker, J., concurring; Resp. App. at 6b, Alito, J., concurring.)

In addition, in accordance with Supreme Court Rule 15.1, plaintiffs point out the following misstatements contained in defendants' Statement of the Case (Pet. at 2–6):[4]

(a) Defendants incorrectly state that following Charles Tabas' death in 1983, defendant Daniel Tabas and Charles Tabas' widow, plaintiff Harriette Tabas, "agreed to continue certain practices, that had been agreed to and participated in by Charles, regarding the use and distribution of partnership funds." (Pet. at 2.) Harriette Tabas did not *agree* to "continue certain practices." The arrangement was presented to Harriette Tabas on behalf of Daniel Tabas as a *fait accompli*. Further, the Third Circuit did not find an agreement by Harriette Tabas. (*See* App. at 4a, 5a n.3.)

(b) Defendants incorrectly state that "the court's decision renders continuity exclusively a durational concept[.]" (Pet. at 4.) The court, after finding "from the strictly durational aspect of the scheme, that plaintiffs in the present case have made a sufficient showing to survive summary judgment on the 'continuity' prong of the pattern analysis[,]" (App. at 33a), went on to consider "what more is required in order to evaluate whether continuity has been established when

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[3]References herein to the Petition for a Writ of Certiorari are to Pet. at __. References herein to Petitioners' Appendix are to App. at _a. References herein to Respondents' Appendix are to Resp. App. at _b.

[4]The Estate points out only those misstatements material to its RICO case against defendants.

predicate acts have occurred over a period of several years." (App. at 34a.) The court first stated that when "the predicate acts have been a regular way of conducting defendant's legitimate business over a long period in the past, the RICO pattern has been satisfied." (App. at 34a.) The court then found that "the allegations made by plaintiffs concerning defendants' manner of doing business over this period satisfy such a RICO continuity requirement." (App. at 34a.) That the court did not, in the words of the petition, render continuity "exclusively a durational concept[,]" (Pet. at 4), is underscored by petitioners' subsequent description of Circuit Judge Alito's concurring opinion: "Judge Alito also concurred in the result, although he declined to join the majority's analysis concerning pattern continuity *and continued to adhere to his analysis that continuity is exclusively a durational concept....*" (Pet. at 5.) (Emphasis added.) If the majority had, as petitioners suggested, rendered continuity "exclusively a durational concept[,]" (Pet. at 4), then Judge Alito would have had no reason to decline "to join the majority's analysis concerning pattern continuity *and continue[] to adhere to his analysis that continuity is exclusively a durational concept....*" (Pet. at 5.) (Emphasis added.)

SUMMARY OF ARGUMENT

The petition for a writ of certiorari should be denied for several reasons. First, contrary to petitioners' suggestion, there is no "conflict" whatever between the Third Circuit's *in banc* decision in this case and this Court's decision in *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989). In fact, the Third Circuit specifically followed this Court's decision in *H.J. Inc.* with regard to its continuity analysis. In addition, the Third Circuit specifically followed this Court's decision in *H.J. Inc.*, as well as this Court's decisions in *National Organization*

for Women, Inc. v. Scheidler, 114 S. Ct. 798 (1994), and *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), when the Third Circuit declined to invent a rule that RICO's pattern of racketeering concept requires an independent allegation and proof of a "societal harm" separate and distinct from that which is posed by the commission of the predicate acts over a substantial period of time. (App. at 30a n.17, 38a.) Likewise, the "conflict" alleged by petitioners between the Third Circuit's *in banc* decision in this case and decisions from the First, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and District of Columbia Circuits is neither real nor irreconcilable. In fact, as even the dissent in the case *sub judice* noted, decisions from the First, Fourth, and Sixth Circuits are in accord with the majority's *in banc* opinion. (App. at 54a n.33, Greenberg, J., dissenting). The decisions from the other circuits cited by petitioners can be reconciled with the Third Circuit's decision in this case. *See infra* pp. 8–23.

Second, petitioners would have this Court "amend" RICO -- a task that this Court repeatedly has made crystal clear can be done only by Congress. *H.J. Inc.*, 492 U.S. at 249; *Sedima*, 473 U.S. at 499–500. Significantly, the very amendment sought by petitioners in this case (*i.e.*, the rejection of mail fraud as a predicate act in cases involving legitimate businesses absent proof of a "societal harm" beyond that posed by the commission of related predicate acts of mail fraud over a substantial period of time) was specifically considered *and not enacted* by Congress. *See infra* pp. 23–27.

Third, petitioners would have this Court review the constitutionality of a civil statute under circumstances where the constitutionality was not raised in the district court, in the court of appeals in the first instance, or in the court of appeals *in banc*, and where there has been no assertion that the statute governing the underlying predicate offense (*i.e.*, the federal

mail fraud statute) also is unconstitutional. *See Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 58 (1989) ("We find no merit in petitioner's claim that the Indiana RICO law is unconstitutionally vague as applied to obscenity predicate offenses. Given that the RICO statute totally encompasses the obscenity law, if the latter is not unconstitutionally vague, the former cannot be vague either."). *See infra* pp. 27–29.

For the foregoing reasons, all of which are explained in greater detail below, the petition for a writ of certiorari should be denied.

ARGUMENT

1. The Third Circuit's *in banc* decision in this case does not conflict with this Court's decision in *H.J. Inc.* or with the decisions of the other Courts of Appeals, and the Third Circuit properly refused to require an independent allegation and proof of a "societal harm" separate and apart from that which is posed by the commission of the predicate acts over a substantial period of time.

(a) Defendants erroneously assert that the Third Circuit's *in banc* opinion on the issue of continuity conflicts with this Court's decision in *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989). (Pet. at 7.) The Third Circuit expressly followed this Court's decision in *H.J. Inc.* when it held that plaintiffs had presented evidence that defendants engaged in a pattern of racketeering activity, legally sufficient to survive summary judgment. (App. at 29a–38a.) In *H.J. Inc.*, this Court made clear that a plaintiff can satisfy the continuity requirement of RICO *either* by showing a series of related predicate acts extending over a substantial period of time (closed-ended continuity) *or* by showing that the

racketeering acts themselves threaten future repetition (open-ended continuity). 492 U.S. at 241-42. In other words, if a plaintiff cannot show that the related predicate acts of racketeering have been already ongoing for a substantial period of time, then the plaintiff must show that there is a threat that the related predicate acts of racketeering will continue into the future.

In this case, although not required to do so, plaintiffs demonstrated both closed-ended and open-ended continuity under *H.J. Inc.*, and the Third Circuit so found. (App. at 33a-35a.) Indeed, plaintiffs showed a series of related predicate acts (forty-one acts of mail fraud) extending over a period of three and one-half years. (App. at 33a.) The Third Circuit found that this showing, coupled with the "allegations made by plaintiffs concerning defendants' manner of doing business over this period[,] satisfy ... a RICO continuity requirement." (App. at 34a (citing *H.J. Inc.*).) The court of appeals then alternatively held that "even if we were not to have found that conduct lasting three and one-half years was sufficient to establish closed-ended continuity, we conclude that continuity still would have been established ... under an 'open-ended' continuity analysis." (App. at 35a (citing *H.J. Inc.*).) The fact that the Third Circuit considered something "more" beyond duration to determine "closed-ended continuity" (App. at 34a & n.20), and the fact that the Third Circuit reached and decided the question of "open-ended continuity" (App. at 35a-37a), flatly contradict the suggestion in defendants' first Question Presented that the Third Circuit rested its finding of continuity on duration alone.[5] Given the Third Circuit's

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[5]Plaintiffs argued in the court of appeals that proof that defendants committed related predicate acts of mail fraud over a substantial period of time, here more than three and one-half years, is, in

(continued...)

treatment of the continuity analysis, defendants' first Question Presented is hypothetical and should not be reviewed by this Court.

This Court should also decline to review defendants' first Question Presented since the Third Circuit specifically *followed* the teachings of this Court when it refused to invent a rule that RICO's pattern of racketeering concept requires an allegation and proof of a "societal harm" separate and distinct from that which is posed by the commission of related predicate acts over a substantial period of time. (App. at 30a n.17, 38a.) As the Third Circuit stated:

> We recognize that our ruling means that RICO, with its severe penalties, may be applicable to many "garden-variety" fraud cases, particularly considering the judiciary's broad interpretation of the mail fraud statute. We are bound, however, by the language of RICO itself and the Supreme Court's instruction that "RICO is to be read broadly." Indeed, the Supreme Court has consistently struck down efforts by the courts of appeals to narrow RICO's scope.

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[5](...continued)
itself, sufficient to satisfy the continuity prong of RICO's pattern requirement. Four of the judges of the court of appeals agreed. *See* App. at 42a-45a (Becker, J. concurring); 49a-50a (Alito, J., concurring). Contrary to the suggestion in defendants' first Question Presented, however, and as noted above, the court of appeals rested its finding of closed-ended continuity on plaintiffs' showing of both substantial duration *and* that the commission of the related predicate acts was defendants' regular way of doing business. (App. at 34a & n.20.)

> We share the Supreme Court's concern over the broad application of the civil RICO statute. We are nonetheless bound by the language of the statute and the Supreme Court's interpretation of it. Accordingly, it is for Congress to decide whether to narrow the scope of RICO; we are not in a position to do so by requiring that parties prove elements of a threat or of an injury, presented by predicate racketeering activity, beyond what is expressed in the language of the statute itself.

(App. at 38a.) (Citations and footnote omitted.)[6] Circuit Judge Becker, in his Honor's concurring opinion in this case, aptly explained why RICO plaintiffs who are alleging predicate acts of mail fraud are entitled to the same treatment as RICO plaintiffs who are alleging predicate acts of, for example, extortion, kidnapping or murder:

> Congress in the RICO statute specified an extensive laundry list of serious and arguably less serious acts that all constitute racketeering activity, and so it strikes me as improper to

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[6] *See also H.J. Inc.*, wherein this Court specifically held:

> There is no more room in RICO's "self-consciously expansive language and overall approach" for the imposition of an organized crime limitation than for the "amorphous 'racketeering injury' requirement" we rejected in *Sedima* [citation omitted]. We thus decline the invitation to invent a rule that RICO's pattern of racketeering concept requires an allegation and proof of an organized crime nexus.

492 U.S. at 249; *see also National Org. for Women, Inc. v. Scheidler*, 114 S. Ct. 798 (1994) (refusing to invent a rule that RICO requires that predicate acts be committed with economic motive).

> maintain that the statute's "pattern" requirement builds in a normative evaluation of the seriousness of the predicate acts. The concern about federalizing and attaching drastic penalties to "garden variety fraud," [citation omitted], is a legitimate one, but one that must be addressed by Congress rather than the courts. And Congress has told us what sorts of acts to worry about. Our concern with the pattern requirement is simply to insure that RICO liability is not attached to "isolated" or "sporadic" predicate acts. That task requires no inquiry into the seriousness of the acts. The "threat" for which we are looking is the threat of repeated prohibited conduct, not the threat of grievous harm.

(App. at 47a–48a.)

In sum, the Third Circuit's refusal to require proof of a "societal harm" separate and distinct from the societal harm that is inflicted by the commission of a series of related predicate acts over a substantial period of time is completely in accord with this Court's precedents. Time and again, the federal district courts and courts of appeals have attempted to limit the reach of civil RICO by establishing pleading and proof requirements nowhere contained in RICO itself. Time and again, this Court has struck down those attempts. Indeed, as noted by the court below (App. at 38a & 30a n.17), in *Sedima*, this Court struck down the Second Circuit's establishment of a requirement that there be a conviction on the predicate act and a requirement that there be proof of an amorphous "racketeering injury." 473 U.S. at 495. Four years later, in *H.J. Inc.*, this Court struck down the Eighth Circuit's establishment of a requirement that there be multiple schemes and a requirement that there be a nexus to organized crime.

492 U.S. at 250. Five years after that, in *National Organization for Women*, this Court struck down the Seventh Circuit's establishment of a requirement that there be proof that either the racketeering enterprise or the predicate acts be motivated by an economic purpose. 114 S. Ct. 806. In the case *sub judice*, the Third Circuit, sitting *in banc*, has refused to take the amorphous concept of "societal harm," whatever that may be, and make it a requirement under RICO. (App. at 30a n.17, 38a.) In so refusing, the Third Circuit has followed the clear instructions of this Court; there is no need to review that decision.

(b) Defendants also erroneously assert that the Third Circuit's *in banc* opinion on the issue of continuity conflicts with the law in the First, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and District of Columbia Circuits, as well as with other decisions in the Third Circuit. Contrary to the assertions in the petition for certiorari, there is no real or irreconcilable "conflict."

For example, defendants point to the decision by now-Justice Breyer in *Apparel Art Int'l, Inc. v. Jacobson*, 967 F.2d 720 (1st Cir. 1992), as representing a conflict between the First and Third Circuits on the issue of continuity. (Pet. at 11.) However, nothing contained in *Apparel Art* conflicts with the Third Circuit's *in banc* decision in this case. In *Apparel Art*, the First Circuit found a pattern of racketeering to be lacking in a case by a subcontractor against a contractor for conduct by the contractor in obtaining one Defense Department contract. 967 F.2d at 723-24. Importantly, the court there specifically found that the several instances of criminal behavior "*all took place over a comparatively short period of time*." *Id.* at 723 (emphasis added). The court also found that relatedness was missing. Noting that a pattern is not formed by "'sporadic activity,'" the court concluded "that the complaint does not allege the two or more separate acts that bear a

relationship, each to the others, either 'amount[ing] to,' or 'pos[ing] a threat of,' the kind of 'continued' criminal activity at which the RICO statute was aimed." *Id.* at 724 (quoting *H.J. Inc.*, 492 U.S. at 239) (brackets supplied by *Art Apparel* court). The First Circuit's analysis does not, as defendants suggest, stand in stark contrast to the analysis conducted by the Third Circuit in this case; the Third Circuit merely reached a different conclusion than did the *Apparel Art* court, based upon the facts and circumstances before it. *See* App. at 27a–37a; App. at 42a–45a (Becker, J., concurring). Importantly, in *Apparel Art*, the First Circuit cited with approval its earlier decision in *Fleet Credit Corp. v. Sion*, 893 F.2d 441 (1st Cir. 1990), a case which the dissent in this case concedes is supportive of the view that the commission of related predicate acts over a substantial period of time (in *Fleet*, four and one-half years) meets the pattern of racketeering requirement. *See* App. at 54a n.33 (Greenberg, J., dissenting). *Fleet Credit*, a case cited by plaintiffs in the district court and the court of appeals below, involved a single scheme devised and executed by a husband and wife in which they used two jewelry manufacturing companies to defraud plaintiff of approximately $7.5 million in loans. 893 F.2d at 442. In holding that plaintiff's complaint properly alleged a pattern of racketeering activity, the First Circuit stated:

> Here, Fleet alleges that 95 fraudulent mailings were sent over a four and one-half year period. Regardless of how we might have addressed this issue before *H.J.*, we believe this is the type of "long-term criminal conduct" defined by the *H.J.* court as constituting "continued criminal activity." The alleged criminal conduct spans years, not "a few weeks or months." Keeping in mind Congress's "natural and common sense approach to RICO's pattern

> element," *H.J.*, 109 S.Ct. at 2889, we hold that Fleet's allegations are sufficient to establish continuity.
>
> Had the number of acts alleged by Fleet been few or the period of time short, the predicate acts would not have amounted to continued criminal activity....Too few acts would suggest that the defendants were engaged in only "sporadic activity," *id.* 109 S.Ct. at 2900, and too short a period of time would suggest that defendants were not engaged in "long-term criminal conduct." *Id.* at 2902.

893 F.2d at 447 (footnote omitted). The facts in *Fleet Credit* are much closer to the facts in the instant case than are the facts in *Apparel Art*. The analysis employed by the First Circuit in *Fleet Credit* is essentially the same as that employed by the Third Circuit *in banc* in this case. Accordingly, there is no real conflict between the First and Third Circuits on the issue of continuity.

Likewise, there is no real conflict between the Fourth and Third Circuits. Defendants cite to the Fourth Circuit's decision in *Menasco, Inc. v. Wasserman*, 886 F.2d 681 (4th Cir. 1989), as conflicting with the Third Circuit's decision in this case. (Pet. at 12.) However, *Menasco* is distinguishable from the instant case because the unlawful activity only "took place over approximately one year." 886 F.2d at 684. More importantly, after deciding *Menasco*, the Fourth Circuit decided *Walk v. Baltimore & Ohio R.R.*, 890 F.2d 688 (4th Cir. 1989), a case which the dissent in this case also concedes is supportive of the view that the commission of related predicate acts over a substantial period of time (in *Walk*, ten years) meets the pattern of racketeering requirement. *See* App.

at 54a n.33 (Greenberg, J., dissenting). *Walk*, a case cited by plaintiffs in the district court and the court of appeals below, was on remand from this Court for reconsideration in light of *H.J. Inc.* On remand, the Fourth Circuit noted that its earlier analysis "saw in the many alleged predicate acts of mail and wire fraud only a single 'scheme, limited in scope to the accomplishment of a single discrete objective -- forcing out the minority in a single corporate structure.'" 890 F.2d at 689 (quoting from its earlier opinion, 847 F.2d at 1105). The Fourth Circuit went on to find that, in light of this Court's decision in *H.J. Inc.*, "our analysis ... probably gave too little weight to the sheer duration of the predicate acts alleged, and too much to their closed-ended character." 890 F.2d at 689. The Fourth Circuit stated:

> Whether analyzing "closed-ended" or "open-ended" conduct, our approach has been designed to determine on a case-by-case basis whether the "scope and persistence" of predicate acts was such as to demonstrate that they constituted, or sufficiently threatened, "long-term criminal conduct," so as to bring them within Congress' expressed concern with that sort of conduct rather than merely episodic criminal activity.
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> * * *
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> [W]e conclude that activity continuing, as here alleged, for a period of ten years, must be considered to have "extended over a substantial period of time," hence to constitute long-term conduct meeting the pattern requirement, notwithstanding the "closed-ended" nature of the conduct.

Id. at 690; *see also Morley v. Cohen*, 888 F.2d 1006 (4th Cir. 1989) (where predicate acts of racketeering were mail and wire

fraud, a scheme to defraud investors of five years duration was sufficient to establish a pattern of racketeering activity). There obviously is no real conflict between the Fourth and Third Circuits on the issue of continuity.

Nor is there a conflict between the law of the Sixth and Third Circuits. Defendants cite to District Judge Aldrich's decision on behalf of the panel in *Vemco, Inc. v. Camardella*, 23 F.3d 129 (6th Cir.), *cert. denied*, 115 S. Ct. 579 (1994), as conflicting with the Third Circuit's *in banc* decision in this case. (Pet. at 12 n.2.) *Vemco* is easily reconciled with this case; the *Vemco* court disregarded certain events as not qualifying as predicate acts under RICO, thus reducing the duration of the alleged scheme from more than four years to just seventeen months. 23 F.3d at 134. Importantly, nothing contained in *Vemco* distinguishes or otherwise casts doubt upon the continued validity of the Sixth Circuit's prior decision in *Dana Corp. v. Blue Cross & Blue Shield Mutual of N. Ohio*, 900 F.2d 882 (6th Cir. 1990). *Dana* was cited by plaintiffs in the district court and the court of appeals below, and was also conceded by the dissent below as supportive of the view that the commission of related predicate acts over a substantial period of time (in *Dana*, seventeen years) meets the pattern of racketeering requirement. *See* App. at 54a n.33 (Greenberg, J., dissenting). In *Dana*, noting that defendants cannot "'insulate [themselves] from the reach of RICO simply by repeatedly bilking the same victim[,]'" the Sixth Circuit concluded that "the allegations of fraud occurring for a period of seventeen years, along with the specific mailings evidencing such a scheme, are sufficient to state a claim of a pattern of racketeering activity." 900 F.2d at 886–87 (quoting *Blue Cross & Blue Shield of Michigan v. Kamin*, 876 F.2d 543, 545 (6th Cir. 1989)). There obviously is no real conflict between the Sixth and Third Circuits on the issue of continuity.

In urging the existence of a conflict between the Fifth and Third Circuits, defendants direct this Court to *In re Burzynski*, 989 F.2d 733 (5th Cir. 1993). (Pet. at 12 n.2.) *Burzynski* simply held that fraudulent acts committed during the course of and solely pertaining to litigation regarding the denial of insurance claims did not amount to or threaten continuing racketeering activity. Thus, *Burzynski* can be reconciled with the Third Circuit's opinion in this case. In addition, *Abell v. Potomac Ins. Co. of Ill.*, 946 F.2d 1160 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1944 (1992), a case cited by defendants in connection with their constitutional argument (Pet. at 19 n.9), the Fifth Circuit found continuity where a defendant committed a series of related mail fraud predicates over a period of more than six years, in connection with a bond offer, resulting in a multi-million dollar loss to some 500 bondholders. 946 F.2d at 1168. The Fifth Circuit rejected defendant's argument that plaintiffs "were only able to show that [defendant] engaged in isolated and sporadic criminal acts related to the ... bond offer." *Id.* & n.23. *Burzynski* did nothing to change the continuity analysis used by the Fifth Circuit in *Abell*; there is no irreconcilable conflict between the Fifth and Third Circuits on the issue of continuity.

Likewise, there is no irreconcilable conflict between the Ninth and Third Circuits. Defendants cite *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529 (9th Cir. 1992), as conflicting with the Third Circuit's *in banc* decision in this case. (Pet. at 12 n.2.) Defendants have again manufactured a conflict where none exists. In *Sever*, a RICO action based upon an alleged wrongful termination of employment, the Ninth Circuit found both relatedness and continuity to be lacking. 978 F.2d at 1535. The alleged predicate acts were committed over a period of less than one year. *Id.* at 1532-33. Further, there was no suggestion that the unlawful conduct was defendants' regular way of doing business such that there existed a threat

of continued criminal activity. *Id.* at 1535. Significantly, other decisions in the Ninth Circuit have found the existence of a pattern of racketeering when plaintiffs have shown, as plaintiffs showed here, that the unlawful conduct was a defendant's regular way of doing business. *See, e.g., Ticor Title Ins. Co. v. Florida*, 937 F.2d 447, 450 (9th Cir. 1991) (partners in real estate investment business who forged three federal tax lien releases within a thirteen month period satisfied the continuity prong of the pattern test since the "frequency of the forgeries suggests that this practice had become a regular way of conducting business..."); *cf. Ikuno v. Yip*, 912 F.2d 306, 309 (9th Cir. 1990) (attorney's actions in filing of two allegedly false annual reports "carried with them the threat of continuity [since he] was filing annual reports and there is no evidence that he would have stopped doing so if KLCL had not ceased to do business."). Given that *Sever* can be reconciled with the Third Circuit's decision in this case, and given the Ninth Circuit's decisions in these other cases, there is no irreconcilable conflict between the Ninth and Third Circuits on the issue of continuity.

Further, there is no conflict between the "multiple factor tests" employed the Seventh, Tenth, and District of Columbia Circuits and the analysis conducted by the Third Circuit *in banc* in this case. (Pet. at 13.) Indeed, defendants themselves concede that the multiple factor tests employed by these circuits is comparable to that which the Third Circuit applied in *Barticheck v. Fidelity Union Bank*, 832 F.2d 36 (3d Cir. 1987). (Pet. at 13.) Contrary to defendants' assertion that the Third Circuit "has now virtually abandoned" *Barticheck*, (Pet. at 13), the Third Circuit carefully considered and specifically declined to overrule *Barticheck*, stating:

> The fact that we do not employ the *Barticheck* factors in our analysis here does not, however,

> mean that they might not be relevant in a different case in determining if continuity exists. As the Court noted in *H.J. Inc.*, in those cases where relatedness and continuity are in doubt, other factors should be examined to discern if there is a "pattern of racketeering activity" under RICO[.]

(App. at 36a.) The Third Circuit's finding that, under the facts and circumstances of this case, relatedness and continuity are not in doubt, and hence an analysis of the other *Barticheck* factors is unnecessary, does *not* mean that the Third Circuit's decision conflicts with the decisions of others circuits that used factors similar to those enumerated in *Barticheck* to determine whether, in the facts and circumstances of those cases, relatedness and continuity were present.

It should not go unnoted by this Court that defendants argue how the Third Circuit's *in banc* decision in this case wrongly departs from that court's panel decisions in other cases, such as *Barticheck*, *Marshall-Silver Constr. Co. v. Mendel*, 894 F.2d 593 (3d Cir. 1990), and *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406 (3d Cir.), *cert. denied*, 501 U.S. 1222 (1991). There is nothing irreconcilable about the Third Circuit's *in banc* decision in this case and its panel decisions in other cases. In fact, to the extent one of the panel decisions could be read as conflicting with the *in banc* opinion, that panel decision was overruled. *See* App. at 30a n.17 (overruling *Marshall-Silver* to the extent that it can be read to require "the existence of a 'societal threat,' whatever

exactly that may be, beyond the commission of the criminal predicate acts.").[7]

The Third Circuit's *in banc* decision in this case simply does not, as defendants argue, represent a sharp departure from

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[7]This Court should also note that the author of the dissenting opinion in the instant case, Circuit Judge Greenberg, also authored two opinions under criminal RICO wherein continuity was found to exist based upon the sheer duration of the commission of the predicate acts. *See United States v. Pellulo*, 964 F.2d 193, 210 (3d Cir. 1992) ("In our view, 19 months is sufficiently longer than 'a few weeks or months' and indicates the type of long-term criminal conduct Congress sought to eradicate in enacting RICO.); *United States v. Woods*, 915 F.2d 854, 863 (3d Cir. 1990) ("Woods' conduct also easily satisfies the continuity requirement of *H.J. Inc.* The four years over which these related racketeering acts were committed constitutes a substantial period of time. Accordingly ... a pattern of racketeering activity obviously existed...."), *cert. denied*, 499 U.S. 947 (1991). Judge Greenberg apparently would hold that duration alone can satisfy the continuity prong of RICO's pattern in criminal cases but not civil cases; indeed, in his dissent in this case, Judge Greenberg attempted to distinguish his opinion in *Pellulo* on the ground, *inter alia*, that the unlawful activity in *Pellulo* "had a different ring to it...." (App. at 67a, Greenberg, J., dissenting.) This distinction reveals nothing more than Judge Greenberg's dislike (seemingly shared by many federal judges) for the application of RICO in civil cases wherein the predicate offenses are mail or wire fraud. However, it was Congress' prerogative to include mail and wire fraud as predicate offenses under RICO and the fact that mail fraud in a civil case has "a different ring to it" than does, for example, bribery, in a criminal case, cannot be a sufficient basis upon which to hold that predicate acts of mail fraud committed over a substantial period of time cannot, without more, satisfy continuity, but that predicate acts of bribery committed over a substantial period of time do, without more, satisfy continuity. *Cf.* App. at 47a-48a (Becker, J. concurring).

the existing body of RICO jurisprudence.[8] Moreover, defendants' first Question Presented simply is not raised in the decision below. Accordingly, the petition for a writ of certiorari to review that question should be denied.

2. The Third Circuit's *in banc* decision in this case on the issue of mail fraud does not conflict with the decisions of the other Courts of Appeals, and defendants' request for an opportunity to attempt to "amend" RICO by judicial legislation should be denied.

(a) Defendants assert that the Third Circuit's *in banc* decision conflicts with the decisions of the First and Seventh Circuit on the issue of mail fraud. (Pet. at 15–19.) This erroneous assertion, made in the text of the petition, is the apparent basis for defendants' second and third Questions Presented. Defendants create a conflict between the First and Third Circuits, and between the Seventh and Third Circuits, where none exists. Contrary to the petition for certiorari, the Third Circuit *did* consider the "underlying fraud's duration, scope, character and relation to the mailings" (second Question Presented) before concluding that defendants had committed forty–one related acts of mail fraud. *See* App. at 9a–14a (analysis of Price Waterhouse's two financial reports), 10a ("Price Waterhouse concluded that 'the books and records of Tabas Enterprises do not reflect the equal distribution of income,' and that 'indications of fraud exist.'") ("The Price Waterhouse reports revealed a continuing series of transactions

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[8]It is noteworthy that the court below does not reject or criticize the approach to the continuity question taken by any other circuit. This underscores the fact that there is no real conflict between the Third Circuit and any other circuit.

to divert Tabas Enterprises' income for the personal use of Daniel and his family, through direct monetary benefits as well as other types of benefits."), 21a–23a (analysis of mail fraud statute), 30a–33a & n.18 (examination of the underlying scheme to defraud, and finding that "the mailings were incident to an essential part of the scheme"), 35a (court "focus[es] on the mail fraud element of the underlying fraudulent activity as well as on the element of the mailings" and concludes that "the evidence here meets the standard for open-ended continuity."). Thus, the opinion below does not raise defendants' second Question Presented.

(b) Further, plaintiffs submit that there is only one correct answer to defendants' third Question Presented which, as noted above, was provided by the Third Circuit. *See* App. at 22a n.15 (answering in the affirmative the dissent's query as to "whether Congress intended RICO to be applied to a defendant, participating in a scheme to defraud, who mails substantial payments but not to a similar defendant who delivers the payments by hand ... because, first, the former example constitutes mail fraud and the latter does not and, second, Congress has chosen to include mail fraud as a RICO predicate act."). Thus, there is no need to review defendants' third Question Presented.

(c) Defendants' second and third Questions Presented are aimed at attempting a judicial "amendment" to the civil RICO statute for cases where the underlying predicate acts are mail or wire fraud. *See* Pet. at 16–17.[9] This Court,

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[9]Defendants repeatedly state that the mailings at issue were "innocent mailings." There is no support in the record for that assertion, and the Third Circuit made no such finding. (App. at 32a n.18 ("mailings were incident to an essential part of the scheme").)

(continued...)

however, has repeatedly and correctly stated that the decision of whether to amend RICO rests with Congress. In *Sedima*, this Court stated:

> It is true that private civil actions under the statute are being brought almost solely against [respected and legitimate] defendants, rather than against the archetypal, intimidating mobster. Yet this defect -- if defect it is -- is inherent in the statute as written, and its correction must lie with Congress. It is not for the judiciary to eliminate the private action in situations where Congress has provided it simply because plaintiffs are not taking advantage of it in its more difficult applications.
>
> We nonetheless recognize that, in its private civil version, RICO is evolving into something quite different from the original conception of its enactors. Though sharing the doubts of the Court of Appeals about this increasing divergence, we cannot agree with either its diagnosis or its remedy. The "extraordinary" uses to which civil RICO has been put appear to be primarily the result of the breadth of the predicate offenses, in particular the inclusion of wire, mail, and securities fraud, and the failure of Congress and the courts to develop a meaningful concept of "pattern." We do not believe that the amorphous standing

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[9](...continued)
However, even if the mailings were innocent, no different result would obtain. (App. at 31a n.18 (completely innocent mailings can satisfy the mailing element of the mail fraud statute).)

> requirement imposed by the Second Circuit effectively responds to these problems, or that it is a form of statutory amendment appropriately undertaken by the courts.

Sedima, 473 U.S. at 499–500 (footnote omitted).

This sentiment was reiterated in *H.J. Inc.*, wherein this Court stated:

> If plaintiffs' ability to use RICO against businesses engaged in a pattern of criminal acts is a defect ... it is one "inherent in the statute as written," and hence beyond our power to correct. *RICO may be a poorly drafted statute; but rewriting it is a job for Congress, if it is so inclined, and not for this Court.*

492 U.S. at 249 (emphasis added).[10]

Significantly, a majority of Congress has *not* been inclined to rewrite RICO. Indeed, since this Court's decision in *Sedima*, there have been numerous unsuccessful attempts at amending RICO. *See* S. 1521, 99th Congress, 1st Session (1985); H.R. 5445, 99th Congress, 2d Session (1986); S. 2907,

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[10]The Third Circuit in this case has likewise left the task of changing RICO to Congress. *See* App. at 38a ("it is for Congress to decide whether to narrow the scope of RICO"); *see also* App. at 47a ("The concern about federalizing and attaching drastic penalties to 'garden variety fraud' ... is a legitimate one, but one that must be addressed by Congress rather than the courts.") & 49a ("While I share Judge Roth's uneasiness as to where this leaves the law, I can only hope its eloquent and clarion call will not be ignored by Congress.") (Becker, J., concurring).

99th Congress, 2d Session (1986); S. 1523, 100th Congress, 1st Session (1987); H.R. 1046, 101st Congress, 1st Session (1989); S. 438, 101st Congress, 2d Session (1990); H.R. 5111, 101st Congress, 2d Session (1990); H.R. 1717, 102d Congress, 1st Session (1991).[11] Moreover, many of the proposed changes to RICO involve precisely the type of judicial amendment sought by defendants herein. For example, H.R. 5111, 101st Congress, 2d Session (1990), proposed, *inter alia*, the following amendments to RICO: i) a codification of the definition of "pattern of racketeering" set forth in *H.J. Inc.*,[12] but with an exception thereto which would eliminate the availability of RICO in cases where there was one act of fraud carried out by a series of phone calls or letters; ii) a provision which would limit private civil actions to cases "where its use clearly serves the public interest and provides appropriate deterrence against the repetition of egregious criminal conduct"; and, iii) a judicial "gatekeeper" provision that would

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[11]Of these, only H.R. 5445, 99th Congress, 2d Session (1986) passed the House of Representatives, October 7, 1986. *See* Congressional Record, Vol. 132-Part 20, pp. 29297, 29309. "On October 17, 1986, Senators Metzenbaum and Bumpers attempted to add the House-passed bill to an appropriations bill. That attempt was tabled by the Senate by a vote of 47-44." S. REP. NO. 269, 101st Cong., 2d Sess., pt. 2, at 4 (1990) (emphasis added) (Comm. on the Judiciary).

[12]Significantly, in explaining how continuity can be established under *H.J. Inc.*, the House Committee on the Judiciary reported as follows: "Under [*H.J. Inc.*], the requisite continuity can be established in any of several factors, including, but not limited to, specific evidence of a threat of continuing racketeering activity, *the duration of the racketeering activity over a substantial period of time, or* the relationship of the racketeering acts to a long-lasting criminal enterprise." H.R. REP. NO. 975, 101st Cong., 2d Sess., at 10 (1990) (emphasis added) (Comm. on the Judiciary).

require district courts to dismiss cases that do not meet a host of stringent requirements including those set forth above. *See* H.R. 5111; H.R. REP. NO. 975, 101st Cong., 2d Sess., at 8–15 (1990). Other bills, such as S.438, 101st Congress, 2d Session (1990), proposed amend–ments to RICO such as the detrebling for most private (and some governmental) litigants, and the continuation of treble damages for private litigants only if the defendant was convicted of a criminal violation upon which the civil suit is based. All of these and many other legislative changes were proposed to correct the so–called "defect" that certain members of Congress (at the urging of the judiciary) have perceived to be present in RICO as currently enacted. However, given the repeated, but rejected, congressional attempts to amend RICO, following many hearings and much debate, there can be no doubt that Congress has decided to keep RICO purposefully broad, and has rejected precisely the changes sought by defendants herein. Inasmuch as defendants' second and third Question Presented suggest a form of statutory amendment that Congress has considered but not enacted, review thereof should be denied.

3. This Court should not review the constitutionality of the civil RICO statute in this case.

Like many before them, defendants here seize upon Justice Scalia's concurring opinion in *H.J. Inc.*, and question the constitutionality of the civil RICO statute. (Pet. at 17–18, quoting *H.J. Inc.*, 492 U.S. at 255–56 (Scalia, J., concurring).) Defendants here, however, never raised the question of RICO's constitutionality in the district court, in the court of appeals in the first instance, or in the court of appeals upon rehearing *in banc*. There is absolutely no reason for the Court to consider that question, *i.e.*, defendants' fourth Question Presented, raised

for the first time in this Court.[13] *Compare National Org. for Women, Inc. v. Schiedler*, 114 S. Ct. 798, 806 n.6 (1994) ("None of the respondents made a constitutional argument as to the proper construction of RICO in the Court of Appeals, and their constitutional argument here is directed almost entirely to the nature of their activities, rather than to the construction of RICO. We therefore decline to address the First Amendment question argued by respondents and the amici.").

Even if this Court were to excuse defendants' failure to raise the constitutional question at any stage of the proceedings below, the question is still not properly before this Court because defendants do not (and cannot) contend that the underlying mail fraud statute, defendants' violations of which constitute the underlying predicate acts, is also unconstitutional. As this Court plainly stated in a case

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[13]It is ironic that defendants would cite to *Fretag v. Commissioner*, 501 U.S. 868 (1991), to support their contention that the constitutionality of RICO should be considered by this Court even though neither court below has been asked to pass on it. (Pet. at 19 n.8.) As noted above, in raising the constitutional question in this Court, defendants are obviously attempting to appeal to Justice Scalia who posited the constitutional question in his Honor's concurring opinion in *H.J. Inc.*, as well as to the Chief Justice, and Justices O'Connor and Kennedy, each of whom joined in Justice Scalia's concurrence therein. However, in *Fretag*, it was Justice Scalia, joined by Justices O'Connor, Kennedy and Souter, who would have declined to entertain the constitutional challenge therein presented because that challenge had not been raised and considered in the court below. 501 U.S. at 892–95 (Scalia, J. concurring in part and concurring in the judgment).

wherein the Court was called upon to pass on the constitutionality of Indiana's RICO statute:

> We find no merit in petitioner's claim that the Indiana RICO law is unconstitutionally vague as applied to obscenity predicate offenses. Given that the RICO statute totally encompasses the obscenity law, if the latter is not unconstitutionally vague, the former cannot be vague either.

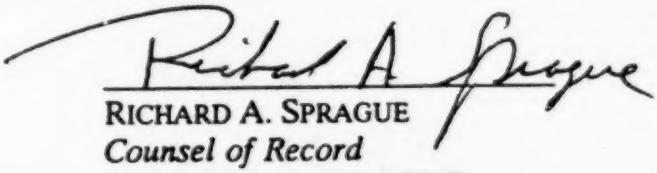
Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 58 (1989). Here, the federal RICO statute totally encompasses the federal mail fraud statute. "[I]f the latter is not unconstitutionally vague, the former cannot be vague either." *Id.*

Finally, every court of appeals called upon to consider the question has upheld the constitutionality of RICO. *See* Pet. at 19 & n.9. Accordingly, defendants' fourth Question Presented should be denied review.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,



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Dated: May 10, 1995
Philadelphia, Pennsylvania

RESPONDENTS' APPENDIX

Filed February 23, 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 92-1495; 92-1529

HARRIETTE S. TABAS; RICHARD S. TABAS;
NANCY C. TABAS; GERALD LEVINSON,
as Executors of the Estate of CHARLES L. TABAS
Appellants

v.

DANIEL M. TABAS; JOSEPH P. CAMPBELL;
JAMES J. MCSWIGGAN; LEE A. TABAS;
ROBERT TABAS; SUSAN TABAS TEPPER;
LINDA TABAS STEMPEL; JOANNE TABAS WURZAK;
CAROL TABAS STOFMAN; HOWARD WURZAK

On Appeal From the United States District Court
For the Eastern District of Pennsylvania
(D.C. Civil Action No. 91-01355)

Argued: January 26, 1993

Before: GREENBERG, ROTH and LEWIS
Circuit Judges

Reargued In Banc October 18, 1995

Before: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, LEWIS, ROTH and MCKEE, *Circuit Judges*

ORDER AMENDING OPINION

Judge Becker's concurring opinion in the above-captioned case filed February 13, 1995, is amended as follows:

(1) On page 35, lines 3 to 5, the first sentence should be amended to read "I join in all of Judge Roth's lead opinion except Part IV.D, and I concur in the judgment."

(2) On page 38, line 14, remove the quotation mark before "a combination".

(3) On page 40, line 7, delete "Majority" and insert "Lead".

(4) On page 42, line 6, delete "the majority" and insert "Judge Roth".

/s/ Edward R. Becker
Circuit Judge

DATED: February 23, 1995

A true Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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FOR THE THIRD CIRCUIT
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March 1, 1995

West Publishing Company
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Re: TABAS V. TABAS
Nos. 92-1495 & 92-1529

Dear Publisher:

The Court has directed me to advise you of corrections which should be made in the published slip opinion which was filed on February 13, 1995, in the above-entitled cases:

On page 14, line 1, delete the first full sentence beginning with "The district court's". (This sentence was inadvertently duplicated.)

On page 26, between line 15 and 16, I have inserted a "B."

On page 30, at the top of the page, I have inserted a "C."

On page 31, between lines 7 and 8, I have inserted a "D."

On page 32, between lines 8 and 9, I have inserted an "E."

Very truly yours,
P. Douglas Sisk, CLERK

By: /s/ Barbara Jacobson
Barbara Jacobson
Deputy Clerk
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(Robert J. LaRocca, Esq.
Honorable Stewart Dalzell

Filed March 7, 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 92-1495; 92-1529

HARRIETTE S. TABAS; RICHARD S. TABAS;
NANCY C. TABAS; GERALD LEVINSON,
as Executors of the Estate of CHARLES L. TABAS
Appellants

v.

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LINDA TABAS STEMPEL; JOANNE TABAS WURZAK;
CAROL TABAS STOFMAN; HOWARD WURZAK

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA
(D.C. Civil Action No. 91-01355)

Argued: January 26, 1993

Before: GREENBERG, ROTH and LEWIS
Circuit Judges

Reargued In Banc October 18, 1995

Before: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO,LEWIS, ROTH and MCKEE, *Circuit Judges*

ORDER AMENDING OPINION

Judge Alito's concurring opinion in the above captioned case filed February 13, 1995, is amended as follows:

The first sentence of that opinion ("I concur in the judgment, and I join parts I, II, VI and VI of the opinion of the court.") is deleted. In its place, the following is inserted:

I concur in the judgment, and I join those parts of Judge Roth's opinion that constitute an opinion of the in banc court, i.e., parts I, II, V, and VI. I do not join part IV of Judge Roth's opinion.

/s/ Samuel A. Alito, Jr.
Circuit Judge

DATED: March 7, 1995

A True Copy:
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Clerk of the United States Court of Appeals
for the Third Circuit

NOT-FOR-PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 92-1495; 92-1529

HARRIETTE S. TABAS; RICHARD S. TABAS;
NANCY C. TABAS, GERALD LEVINSON,
As Executors of the Estate of CHARLES L. TABAS

Appellants

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On Appeal From the United States District Court
For the Eastern District of Pennsylvania
(D.C. Civil Action No. 91-01355)

Argued: January 26, 1993
Before: GREENBERG, ROTH and LEWIS,
Circuit Judges

Reargued In Banc October 18, 1994

Before: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, LEWIS, ROTH and MCKEE, Circuit Judges

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ORDER AMENDING OPINION

Judge Becker's concurring opinion in the above captioned case filed February 13, 1995, is amended as follows:

(1) On page 35, lines 3 to 5, the first sentence should be amended to read "I join in all of Judge Roth's lead opinion, except Parts III and IV.D, and I concur in the judgment."

/s/ Edward R. Becker
Circuit Judge

DATED: May 2, 1995

CLERK
Supreme Court, U.S.
FILED
MAY 15 1995
CLERK

(3)

No. 94-1629

In The

Supreme Court of the United States

October Term, 1994

DANIEL M. TABAS, JOSEPH P. CAMPBELL, JAMES J. McSWIGGAN, LEE A. TABAS, ROBERT TABAS, SUSAN TABAS TEPPER, LINDA TABAS STEMPEL, JOANNE TABAS WURZAK, CAROL TABAS STOFMAN and HOWARD WURZAK,

Petitioners,

vs.

HARRIETTE S. TABAS, RICHARD S. TABAS, NANCY C. TABAS and GERALD LEVINSON, as Executors of the Estate of Charles L. Tabas,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' OBJECTION TO THE "MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER"

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6 pp

No. 94-1629

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

DANIEL M. TABAS, JOSEPH P. CAMPBELL, JAMES J. McSWIGGAN, LEE A. TABAS, ROBERT TABAS, SUSAN TABAS TEPPER, LINDA TABAS STEMPEL, JOANNE TABAS WURZAK, CAROL TABAS STOFMAN, and HOWARD WURZAK,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' OBJECTION TO THE MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Respondents, plaintiffs below (hereinafter "plaintiffs"), respectfully object to and oppose the Motion for Leave to File Brief *Amicus Curiae*, filed on behalf of the American Institute of Certified Public Accountants (hereinafter "the Institute"). The Institute advances two principal reasons in support of its motion, neither of which warrants the grant of said motion.

First, the Institute claims that its interests and the interests of its members "arise from the fact that accountants,

like attorneys and other legitimate businesspersons, increasingly find themselves the target of civil RICO claimants alleging mail, wire, and security fraud[,]" and that the "Third Circuit's sharply divided *in banc* decision below .... will invite even more vexatious civil RICO litigation against accountants and other legitimate businesspersons." However, this Court has already protected the legitimate interests of "outside" accountants who do not participate in the operation or management of the enterprise itself when, in *Reves v. Ernst & Young*, 113 S. Ct. 1163, 1173 (1993), this Court held such individuals to be outside the reach of RICO. In an Institute publication, the JOURNAL OF ACCOUNTANCY, the Institute specifically advised its members (including, significantly, members of the national accounting firm of Price Waterhouse, whose financial reports in this case contributed significantly to the Third Circuit's *in banc* determination that plaintiffs had provided proof that defendants engaged in a pattern of racketeering activity), about *Reves*, stating:

> RICO: THE THREAT IS LIFTED
> *How should CPAs proceed now that the danger of liability arising from the Racketeer Influenced and Corrupt Organizations Act (RICO) seems to have subsided?* [Italics in original.]
>
> For a long time, CPAs have been concerned about lawsuits brought under RICO. Under the federal RICO statute, CPAs and other professionals who are only indirectly associated with a troubled entity can be held liable for massive damages and be implicated in "a pattern of racketeering activity."
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> Fortunately, as this article demonstrates, recent case law shows a trend to dismiss RICO claims

against outside accountants (and other professionals) who did not participate in the management or operation of the companies to which they provided services. As a result, CPAs can take a different approach to RICO lawsuits.

THE IMPORTANCE OF *REVES*

At the forefront of this trend is the U.S. Supreme Court decision in *Reves et al. v. Ernst & Young.... The decision effectively protects outside professionals, such as accountants, against RICO liability.*

* * *

In light of the recent trend discussed above, perhaps the burdensome lawsuits containing RICO claims against accountants will decrease. However, even if such lawsuits continue, *CPAs can rest assured that the threshold requirement of "participation in an enterprise's operation and management," established by the Supreme Court, creates a major obstacle to their liability.*

JOURNAL OF ACCOUNTANCY, October 1994, at 119–22 (emphasis added). Significantly, the Third Circuit expressly followed *Reves* when it affirmed the grant of summary judgment for Peat, Marwick, Main & Company on a RICO claim based on false and misleading financial statements prepared by Peat Marwick, as an outside auditor, for an insolvent insurance company. *The University of Maryland at Baltimore v. Peat, Marwick, Main & Co.*, 996 F.2d 1534, 1538–40 (1993). Given this Court's decision in *Reves* and the Third Circuit's decision in *Peat, Marwick*, and inasmuch as the Third Circuit's *in banc* opinion below in no way implicates the legitimate conduct of outside accountants, the Institute's motion to file a brief *amicus curiae* should be denied.

Second, the Institute claims that the Third Circuit's *in banc* decision below "conflicts with the Third Circuit's prior precedent, as well as with the approaches taken by the other circuits." As stated in the Brief in Opposition to the Petition for a Writ of Certiorari (hereinafter "Brief in Opposition"), the decision below does not conflict with the Third Circuit's prior decisions and, even if it did, that would be irrelevant because this case is a decision of the Third Circuit *in banc* and any prior "conflicting" decisions were panel decisions only. Brief in Opposition at 20–21. When the Third Circuit sitting *in banc* states the law of that circuit, its ruling takes precedent over prior inconsistent panel decisions and settles the law of the circuit. Further, and as also detailed in the Brief in Opposition, there is no real or irreconcilable conflict between the Third Circuit's decision in this case and the decisions from other circuits cited by petitioners to support such a conflict. Brief in Opposition at 13–20. Given its flawed argument regarding the issue of "conflict," the Institute's motion for leave to file a brief *amicus curiae* should be denied.

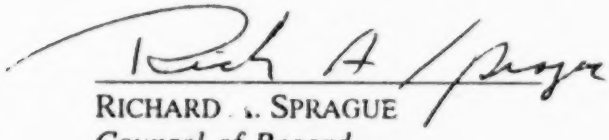
The Institute's motion should also be denied since its proposed brief in support of the grant of a writ of certiorari makes clear that the Institute, like petitioners, would have this Court engage in a judicial "amendment" of RICO under circumstances where Congress has considered but not enacted the very amendments sought by petitioners. *See* Brief in Opposition at 23–27.

In sum, the Institute has failed to establish that it or its members have any *bona fide* reason to inject themselves into this litigation as *amicus curiae*. The concerns expressed by the Institute in its motion (as well as in its proposed brief in support of this Court's exercise of certiorari jurisdiction) have been squarely and adequately addressed and protected by this Court's decision in *Reves*, and/or by the petition for a writ of

certiorari filed in this matter. For these reasons, respondents withheld their consent to the Institute's request to file a brief as *amicus curiae*.

Respondents respectfully request that the Motion for Leave to File Brief *Amicus Curiae*, filed on behalf of the American Institute of Certified Public Accountants, be denied.

Respectfully submitted,



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Of Counsel
DENISE PALLANTE

Dated: May 15, 1995
Philadelphia, Pennsylvania

No. 94-1629

Supreme Court, U.S.
FILED
MAY 15 1995
CLERK

In The

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October Term, 1994

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No. 94-1629

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

DANIEL M. TABAS, JOSEPH P. CAMPBELL, JAMES J. McSWIGGAN, LEE A. TABAS, ROBERT TABAS, SUSAN TABAS TEPPER, LINDA TABAS STEMPEL, JOANNE TABAS WURZAK, CAROL TABAS STOFMAN, and HOWARD WURZAK,

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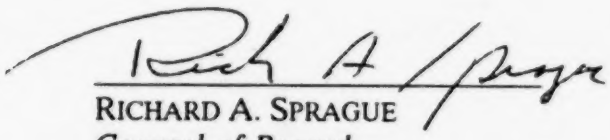
Respectfully submitted,



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Dated: May 15, 1995
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